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DOCKET ENTRIES

1

62 Civ. 3908
CIVIL DOCKET

A In the United States District Court

Jury demand date:

D.C. Form No. 106 Rev.

Title of case			Attorneys				
UNITED STATES OF AMERICA vs. OMAR, S.A., A URUGUAYAN CORPORATION; LAZARD FRERES & CO.; LEHMAN BROTHERS; BELGIAN-AMERICAN BANKING CORP.; BELGIAN- AMERICAN BANK & TRUST CO.; FIRST NA- TIONAL CITY BANK OF NEW YORK, FIRST NATIONAL CITY TRUST CO., AND SWISS BANK CORPORATION.			For plaintiff: US Atty.				
			For defendant:				
Statistical record	Costs		Date	Name or receipt No.	Rec.	Disb.	
J.S. 5 mailed X	Clerk		12-4-62	Shearman	5	—	
J.S. 6 mailed	Marshal		12-7-62	Pd. U.S. Treas		5 —	
Basis of Action: Tax liens for income taxes due.	Docket fee						
Action arose at:	Witness fees Depositions						

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B 62 Civ. 3603

U S A vs. Omar S.A. et al.

Date	Proceedings	Date order of judg- ment noted
Oct. 31-62	Filed complaint and issued summons.	
Nov. 2-62	Filed pltf's affdvt. & show cause order for injunction -ret. 11-5-62	
Nov. 14-62	Filed affdvt. of John B. Lowe on behalf of defts. in opposition to pltf's motion.	
Nov. 14-62	Filed memorandum of 1st Nat'l City Bank & 1st Nat'l City Trust Co. in opposition.	
Nov. 14-62	Filed pltf's memorandum of points & authorities.	
Nov. 14-62	Filed affdvt. of David A. Campbell in opposition.	
Nov. 14-62	Filed Opinion #28,335 - all defts. except First Nat'l City Trust & Belgian-American Bank & Trust Co. enjoined - Submit injunction in accordance with this decision - Dawson, J.	
Nov. 16-62	Filed order pending the determination of this application - defts. Lazard Freres & Co. Lehman Bros., Belgian-American Banking, Belgian-Amer. Bank & Trust, First Nat'l City Bank of NY, & First Nat'l City Trust Co. be restrained from selling, transferring, etc. service of a copy of this order shall be made upon said defts. on or before 11-10-62 by 5:00 p.m. - Dawson, J. mailed notice - Marsh's return of service of order attached.	
Nov. 17-62	Filed stip. & order extending time for deft. Lehman Bros. to answer to 12-10-62 - Clerk.	
Nov. 21-62	Filed stip. & order extending time for defts' (First National City Bank and First National City Trust Co) to answer to 12-4-62 - Clerk.	
Nov. 21-62	Filed order, that pending the determination of this action or until further order of this court, the defts, Lazard Freres & Co. Lehman Brothers, Belgian-American Banking Corp and First National City Bank of New York, or any of them be and they are hereby restrained from selling, transferring, pledging encumbering, disposing of, or distributing any property or rights to property of Omar, S.A. including but not limited to, any sums, credits, stock, or bonds or any interest, dividends of the said Omar, S.A., by them or by any of their branches agents, or nominees whether located within the United States or not and whether their branches, agents, or nominees are located within the United States or not. - Dawson, J. - m.d.	
Nov. 23-62	Filed stip. & order extending time of deft. Lazard Freres & Co. to answer to 12-6-62 - Clerk.	
Nov. 23-62	Filed stip. & order extending time of defts. Belgian-Amer. Banking & Belgian-Amer. Bank & Trust Co. to answer to 12-5-62 - Clerk.	
Dec. 4-62	Filed defts' (First Nat'l City Bank) notice of appeal mailed copy to U.S. Attorney.	
Dec. 4-62	Filed bond undertaking for costs on appeal - Great American Ins. Co.	
Dec. 5-62	Filed stip. & order extending time of defts. (Belgian-American Bkg Corp & Belgian American Bk & Tr Co.) to answer to 12-19-62 - Clerk.	
Dec. 5-62	Filed stip. & order extending time of defts (First National City Bank & First Nat'l City Tr Co) to answer to 12-18-62 - Clerk.	
Dec. 11-62	Filed stip. & order extending time of deft. Lazard Freres & Co. to answer to 12-20-62 - Clerk.	
Dec. 11-62	Filed stip. & order extending time for deft. Lehman Bros. to answer to 12-20-62 - Clerk.	
Dec. 12-62	Issued additional summons.	
Dec. 12-62	Filed pltf's amendment to complaint.	
Dec. 18-62	Filed additional summons & return, served Swiss Bank 12-14-62.	
Dec. 20-62	Filed stip. & order extending time for defts. First Nat'l City Bank & First Nat'l City Trust to answer to 1-18-63. Weinfeld, J.	
Dec. 20-62	Filed stip. & order extending time for defts. Belgian-Amer. et ano to answer to 1-18-63. Weinfeld, J.	
Dec. 22-62	Filed stip. & order extending time for deft. Lehman Bros. to answer to 1-18-63. Weinfeld, J.	
Dec. 22-62	Filed stip. & order adjourning pltf's show cause order to 12-31-62, etc. - Weinfeld, J.	
Dec. 31-62	Filed stip. & order adjourning pltf's show cause order to 1-15-63, etc. - Cooper, J.	

C [File endorsement omitted]

1 [File endorsement omitted]

In The United States District Court for the Southern District
of New York

(62 Civ. 3603)

UNITED STATES OF AMERICA, PLAINTIFF

v.

OMAR. S. A., A URUGUAYAN CORPORATION; LAZARD FRERES &
CO.; LEHMAN BROTHERS; BELGIAN-AMERICAN BANKING
CORP.; BELGIAN-AMERICAN BANK & TRUST CO.; FIRST NA-
TIONAL CITY BANK OF NEW YORK; AND FIRST NATIONAL
CITY TRUST CO., DEFENDANTS

Complaint—Filed October 31, 1962

The United States of America, plaintiff herein, by its attor-
ney, Vincent L. Broderick, United States Attorney for the
Southern District of New York, alleges as follows:

I

This action is brought pursuant to Sections 7401, 7402,
and 7403 of the Internal Revenue Code of 1954, and pursuant
to Section 1345 of Title 28 of the United States Code.

II

This action is authorized and sanctioned by the Commis-
sioner of Internal Revenue, the delegate of the Secretary of
the Treasury, and is brought at the direction of the Attorney
General of the United States.

III

At all times mentioned herein this plaintiff has been and
is now a sovereign corporation and body politic.

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IV

(a) The defendant, Omar, S.A. is a Uruguayan corporation
whose address is 12 de Diciembre 789, Montevideo, Uruguay.

(b) The defendant, Lazard Freres & Co. is licensed to do business within the State of New York and has a place of business at 44 Wall Street, New York, New York.

(c) The defendant, Lehman Brothers, is licensed to do business within the State of New York and has a place of business at One William Street, New York, New York.

(d) The defendant, Belgian-American Banking Corp., is a corporation licensed to do business in the State of New York and has a place of business at 52 Wall Street, New York, New York.

(e) The defendant, Belgian-American Bank & Trust Co., is a corporation licensed to do business in the State of New York and has a place of business at 52 Wall Street, New York, New York.

(f) The defendant, First National City Bank of New York, is a corporation licensed to do business in the State of New York and has a place of business at 55 Wall Street, New York, New York.

(g) The defendant, First National City Trust Co., is a corporation licensed to do business in the State of New York and has a place of business at 22 William Street, New York, New York.

V

On October 31, 1962, the Director of International Operations, a delegate of the Commissioner of Internal Revenue, assessed a corporate income tax deficiency plus interest and penalties against the defendant, Omar, S.A., in the amount of \$1,078,780.76 for the fiscal year ending March 31, 1955. Notice

3 of this assessment and demand for payment of this assessment was sent to the taxpayer on October 31, 1962, but the taxpayer has neglected and failed to pay this assessment and there is outstanding on this assessment the sum of \$1,078,780.76 plus interest according to law.

VI

On October 31, 1962, the Director of International Operations, a delegate of the Commissioner of Internal Revenue, assessed a corporate income tax deficiency plus interest and penalties against the defendant, Omar, S.A., in the amount of \$3,915,868.00 for the fiscal year ending March 31, 1956. Notice of this assessment and demand for payment of this assessment

was sent to the taxpayer on October 31, 1962, but the taxpayer has neglected and failed to pay this assessment and there is outstanding on this assessment the sum of \$3,915,868.00, plus interest according to law.

VII

On October 31, 1962, the Director of International Operations, a delegate of the Commissioner of Internal Revenue, assessed a corporate income tax deficiency plus interest and penalties against the defendant, Omar, S.A., in the amount of \$1,235,625.50 for the fiscal year ending March 31, 1957. Notice of this assessment and demand for payment of this assessment was sent to the taxpayer on October 31, 1962, but the taxpayer has neglected and failed to pay this assessment and there is outstanding on this assessment the sum of \$1,235,625.50 plus interest according to law.

VIII

On October 31, 1962, the Director of International Operations, a delegate of the Commissioner of Internal Revenue, assessed a corporate income tax deficiency plus interest and penalties against the defendant, Omar, S.A., in the amount of \$2,027,979.66 for the fiscal year ending March 31, 1958. Notice of this assessment and demand for payment of this assessment was sent to the taxpayer on October 31, 1962, but the taxpayer has neglected and failed to pay this assessment and there is outstanding on this assessment the sum of \$2,027,979.66 plus interest according to law.

IX

On October 31, 1962, the Director of International Operations, a delegate of the Commissioner of Internal Revenue, assessed a corporate income tax deficiency plus interest and penalties against the defendant, Omar, S.A., in the amount of \$4,006,282.26 for the fiscal year ending March 31, 1959. Notice of this assessment and demand for payment of this assessment was sent to the taxpayer on October 31, 1962, but the taxpayer has neglected and failed to pay this assessment and there is outstanding on this assessment the sum of \$4,006,282.26 plus interest according to law.

X

On October 31, 1962, the Director of International Operations, a delegate of the Commissioner of Internal Revenue, assessed a corporate income tax deficiency plus interest and penalties against the defendant, Omar, S.A., in the amount of \$4,003,005.64 for the fiscal year ending March 31, 1960. Notice of this assessment and demand for payment of this assessment was sent to the taxpayer on October 31, 1962, but the taxpayer has neglected and failed to pay this assessment and there is outstanding on this assessment the sum of \$4,003,005.64 plus interest according to law.

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XI

On October 31, 1962, the Director of International Operations, a delegate of the Commissioner of Internal Revenue, assessed a corporate income tax deficiency plus interest and penalties against the defendant, Omar, S.A., in the amount of \$3,001,615.05 for the fiscal year ending March 31, 1962. Notice of this assessment and demand for payment of this assessment was sent to the taxpayer on October 31, 1962, but the taxpayer has neglected and failed to pay this assessment and there is outstanding on this assessment the sum of \$3,001,615.05 plus interest according to law.

XII

The total amount due on the assessments set forth in paragraphs V to XI above is \$19,269,156.87, and payment of this sum is secured by a lien arising on the date of assessment, October 31, 1962, and which lien encumbers all property and rights to property of the defendant-taxpayer, Omar, S.A., whether situated in the United States or elsewhere.

XIII

The defendant, Lazard Freres & Co., presently holds stocks, bonds, securities and sums of money for or for the account of the defendant, Omar, S.A., and this property is encumbered by the aforementioned federal tax lien. The property presently held by Lazard Freres & Co., in addition to a cash sum of money includes but is not limited to 7,448 shares of stock in the company known as Mineral & Chemical-Philipp Corp. and 29,837 shares of stock in the company known as Cemento Andino,

S.A., and bonds valued in excess of \$117,500.00 of the company known as Cemento Andino, S.A.

6

XIV

The defendant, Lehman Brothers, presently holds stocks, bonds, securities and sums of money for the account of the defendant, Omar, S.A., and this property is encumbered by the aforementioned federal tax lien. The property presently held by Lehman Brothers in addition to a cash sum in excess of \$177,549.00 includes but is not limited to 1300 shares of stock in the company known as Eastern States Corp., 5300 shares of stock in the company known as Mineral & Chemical-Philipp Corp., and bonds valued in excess of \$72,000 of the company known as Plioflex, Inc.

XV

The defendants, Belgian-American Banking Corp., Belgian-American Bank & Trust Co., First National City Bank of New York, and First National City Trust Co., presently hold substantial sums of money for, for the account of, or to the credit of, Omar, S.A., which sums are encumbered by the aforementioned federal tax lien. Further, these sums are held in the United States and in branch offices of these banks in other countries.

WHEREFORE, plaintiff prays:

1. That the Court find, determine and adjudge that the defendant-taxpayer, Omar, S.A., is indebted to the plaintiff in the amount of \$19,269,156.87 plus interest according to law, and that the plaintiff have judgment therefor;

2. That the Court find, determine and adjudge that the plaintiff has a valid and subsisting tax lien, in the amount of the liability adjudged, upon and against all property and rights to property of the defendant-taxpayer, Omar, S.A.;

7 3. That, pending the determination of this suit, this Court enjoin any defendant herein in custody or control of property or rights to property of the defendant-taxpayer, Omar, S.A., from selling, transferring, pledging, disposing of, or distributing any of said property, or the dividends, interest, or other earnings thereon;

4. That the Court compel the defendants, First National City Trust Co., First National City Bank of New York, Belgian-

American Banking Corp., and Belgian-American Bank & Trust Co., to return all property and rights to property of defendant-taxpayer, Omar, S.A., to the jurisdiction of this Court for disposition and application consistent with the interests of plaintiff and for enforcement of plaintiff's lien on said property and rights to property;

5. That this Court order the foreclosure of the plaintiff's lien on the property now held by the defendants, Omar, S.A., Lazard Freres & Co., Lehman Brothers, Belgian-American Banking Corp., Belgian-American Bank & Trust Co., First National City Bank of New York and First National City Trust Co., and that this Court order the said property to be sold at a judicial sale in accordance with law and the proceeds therefrom to be turned over to this plaintiff in satisfaction of this plaintiff's lien on said property except that this Court order such sums of money as are held by these defendants to be paid over to this plaintiff in satisfaction of this plaintiff's lien.

8 6. That this Court grant this plaintiff such other and further relief that it deems is just, equitable and proper in the premises including costs:

VINCENT L. BRODERICK,

United States Attorney.

By ROBERT ARUM,

*Assistant United States Attorney, U.S. Court House,
Foley Square, New York 7, N.Y., CO 7-7100 Ext.
326.*

9 *Duly sworn to by John F. Beggan—jurat omitted in
printing.*

10

[File endorsement omitted]

In the United States District Court for the Southern District
of New York

62 Civ. 3603

[Title omitted]

Order to Show Cause—October 31, 1962

Upon the annexed application for temporary restraining order of the plaintiff United States of America and upon the annexed affidavits of William R. T. Gottlieb, John H. Walker and Forrest J. Kern, let the defendants OMAR, S.A., a Uruguayan corporation; LAZARD FRERES & CO.; LEHMAN BROTHERS; BELGIAN-AMERICAN BANKING CORP.; BELGIAN-AMERICAN BANK & TRUST CO.; FIRST NATIONAL CITY BANK OF NEW YORK; and FIRST NATIONAL CITY TRUST CO., show cause before this Court, at a term for motions thereof, to be heard at the United States Courthouse, Room 506, Foley Square, in the Borough of Manhattan, City of New York, on the 5th day of November, 1962, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why an order should not be entered enjoining and restraining defendants LAZARD FRERES & CO.,

11 LEHMAN BROTHERS, BELGIAN-AMERICAN BANKING CORP., BELGIAN-AMERICAN BANK & TRUST CO., FIRST NATIONAL CITY BANK OF NEW YORK, and FIRST NATIONAL CITY TRUST CO., or any of them, from selling, transferring, pledging, encumbering, disposing of, or distributing any property or rights to property of defendant-taxpayer OMAR, S.A., including, but not limited to, any sums or credits or stock or bonds or any interest, dividends or other earnings thereon now held for or for the account of the said defendant-taxpayer, by them or by any of their branches, agents, or nominees whether located within the United States or not and whether their branches, agents, or nominees are located within the United States or not.

Sufficient reason appearing therefor, it is

ORDERED that pending the hearing and determination of this application, or the expiration of ten-days from the date hereof, whichever shall first occur, the defendants, LAZARD FRERES

& CO., LEHMAN BROTHERS, BELGIAN-AMERICAN BANKING CORP., BELGIAN-AMERICAN BANK & TRUST CO., FIRST NATIONAL CITY BANK OF NEW YORK, and FIRST NATIONAL CITY TRUST CO., or any of them, be and they are hereby restrained from selling, transferring, pledging, encumbering disposing of, or distributing any property or rights to property of OMAR S.A., including, but not limited to, any sums, credits stock or bonds or any interest dividends, or other earnings thereon now held for or for

12 the account of the said OMAR, S.A., by them or by any of their branches, agents, or nominees whether located within the United States or not and whether their branches, agents, or nominees are located within the United States or not. It is further

ORDERED that service of a copy of this Order to Show Cause and affidavits annexed hereto shall be made upon the said defendants on or before the 1st day of November, 1962, by 5 p.m.

Dated: New York, N.Y., October 31, 1962.

H. R. TYLER, Jr.,

U.S.D.J.

Issued at 3:40 p.m. the 31st day of October, 1962.

13 In the United States District Court
for the Southern District of New York

62 Civ. 3603

[Title omitted]

Order to Show Cause—October 31, 1962

[CLERK'S NOTE: "Order to show cause—October 31, 1962" is omitted from the record here. It appears on page 9, supra.]

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In the United States District Court
for the Southern District of New York

[Title omitted]

APPLICATION FOR TEMPORARY RESTRAINING ORDER

Plaintiff moves the Court for an order temporarily restraining defendants, Lazard Freres & Co., Lehman Brothers, Belgian-American Banking Corp., Belgian-American Bank & Trust Co., First National City Bank of New York, and First National City Trust Co., or any of them, from selling, transferring, pledging, encumbering, disposing of, or distributing any property or rights to property of defendant-taxpayer, Omar, S.A., including, but not limited to any sums or credits or stocks or bonds or any interest, dividends or other earnings thereon now held for or for the account of the said defendant-taxpayer, by them or by any of their branches, agents, or nominees whether located within the United States or not and whether their branches, agents, or nominees are located within the United States or not.

In support of this application plaintiff shows:

17 1. Defendant-taxpayer, Omar, S.A., is indebted to plaintiff for assessed income taxes, penalties and interest in the total amount of \$19,269,156.87, plus unassessed interest thereon as provided by law.

2. The assessment described in paragraph 1 hereinabove, is secured by a federal tax lien upon all property and rights to property of the said defendant-taxpayer.

3. The principal assets of the said defendant-taxpayer consist of sums, credits, stocks, and bonds now held by the defendants herein or by their branches, agents or nominees both within and without the United States.

4. If any of the said sums, credits, stocks or bonds, or any interest, dividends, or other earnings thereon, are sold, transferred, pledged, encumbered, disposed of, or distributed, plaintiff's lawful rights in and to said sums, credits, stocks and bonds and any interest, dividends or other earnings thereon might become unenforceable in fact and plaintiff would be irreparably injured inasmuch as they might be removed from the power of the Courts of the United States by being transferred to persons without the territorial limits of the United States, or they might be transferred to bona fide purchasers, thus leaving

12' APPLICATION FOR TEMPORARY RESTRAINING ORDER

the Government without a remedy by which it could enforce the large tax liability of defendant-taxpayer, Omar, S.A.

5. Agents and representatives of defendant-taxpayer, Omar, S.A., have threatened to transfer or cause to be transferred its assets now within the United States outside of the territorial limits of the United States if tax claims or assessments were made against it, and substantial assets of said defendant-

18 taxpayer have recently been transferred outside of the territorial limits of the United States all as is more particularly set forth in the attached affidavits which are referred to and adopted herein as though fully set forth herein.

The matters, facts and averments contained in the complaint filed herein are referred to and adopted herein as though fully set forth herein.

No previous application for this relief has heretofore been made.

VINCENT BRODERICK,
United States Attorney.

By ROBERT ARUM,
Assistant United States Attorney.

19 Affidavit of William R. T. Gottlieb in support of application for temporary restraining order:

I, William R. T. Gottlieb, am an employee of the U.S. Internal Revenue Service, Office of International Operations, Washington, D.C., in the capacity of Internal Revenue Agent. I presently reside at 2335 11th St., North Arlington, Virginia.

On or about 2 June 1959 an Internal Revenue form 1120NB, Income Tax return of a nonresident foreign corporation, filed by Omar, S.A., of Montevideo, Uruguay, was assigned to me for examination. Aside from the name and address of the taxpayer, only line 7(b) of the return had been completed. Line 7(b) indicates a credit from a regulated investment company, which Omar claimed in the amount of \$10,358.42. This amount has, apparently, been refunded. The questions on the reverse of the form, under the heading "Additional Information Required" had not been completed. Accordingly, I wrote to Omar on 30 December 1959, requesting this additional information; this letter was followed by a second request on 29 February 1960. Finally, the requested information was supplied, and indicated that Omar did not consider itself to be a personal holding company. In October 1960, a Consent form 872, was solicited and eventually received. On 1 February 1961, a visit was made at the offices of Lehman Bros. and Lazard Freres, both of New York, N.Y., since it had been learned that these two firms had received income on behalf of Omar. The names and addresses of Omar's directors were secured at this time, and it was learned that accounts were handled by these firms for Omar whereby orders for the purchase and sale of securities were placed with these firms and received by them in New York City by telephone, letter, or cable, from abroad.

20 On 26 April 1961, I wrote to Omar and said that information had been obtained which warranted the assumption that Omar was a personal holding company, and that a meeting with a qualified representative of the taxpayer was advisable. On 16 May 1961, Edward Merrigan, Attorney, called to say that Omar was represented by counsel in New York City, and that an appointment was desired in New York City. He did not identify the New York firm. Merrigan called back on 23 May to say that he had checked and found that counsel in New York did not have a power of attorney and could not represent Omar after all. On 8 June I again

wrote to Omar and reviewed the situation, and stated that since no meeting had taken place as requested, on 31 May, I now proposed to make a determination of Omar's tax liability on the basis of information at hand. I now know that in June 1961, a director of Omar came to the United States, and at that time Omar commenced to liquidate its United States holdings of securities. Subsequently, Merrigan again called me, and asked for the nature of the information I wanted. I gave it to him, and from that time until 5 February 1962 there were other conversations and an exchange of correspondence between us concerning clarification of information provided, and reminders of delays, and excuses and reasons for delays. On 5 February, Theodore Tannenwald, Jr., Martin D. Ginsburg, Merrigan, and I, met at Merrigan's office, here in Washington, and discussed the case. Tannenwald and Ginsburg came down from New York City, and are members of the legal firm of Weil, Gotshal & Manges, 60 E. 42nd St., New York, N.Y. As a result of this discussion, I was given to understand that dividends declared and paid by Omar to its stockholders were deposited with a Swiss bank, which acted as paying agent for Omar. The bank was then, or later, identified as the Societe Commerciale de Laines. I now understand that although the Societe may be an existing organization, it is not a bank.

21 Subsequently, another Consent, form 872, was solicited, and received. On 9 May 1962 there was another meeting at which were present, Merrigan, Benjamin Clark, and I. Clark is also a member of Weil, Gotshal & Manges. I have subsequently twice met with Clark to discuss the case, and it was he who stated that if the Revenue Service persisted in the attempt to hold Omar to be a personal holding company, Omar would quite likely liquidate its holdings in the United States, and send the money out of the country. Partly in view of this warning I did not press this argument, but suggested that additional information be provided—particularly, the names and addresses of the shareholders of Omar, since even if the corporation had no further liability for United States taxes, the shareholders did—assuming them to be nonresident aliens.

In the course of my next meeting with Clark, which was in New York City, he asked if it would be possible to settle the case on the basis of holding Omar to be a personal holding company for the fiscal year ending in 1955, but only for that

year. He said that he had not discussed this idea with Omar, but wanted my reaction to it before proceeding further. He thought that Omar would be willing to incur a liability for about \$100,000 of tax, and since no dividends had been paid to Omar's stockholders in 1955, the personal holding company issue seemed to be a valid one. I answered him carefully, saying that anything he or Omar wanted to discuss would be given careful consideration.

On 20 August 1962, Clark and Tannenwald appeared at this office; Tannenwald did not stay long, but Clark and I discussed additional information that he had brought along, and

22 I asked for another power of attorney which would include him (this was later supplied). He asked again if we could settle on the basis he had previously suggested, but indicated that he had not yet discussed it with Omar—I gave him about the same answer as before.

Late in September, Clark called me to say that Omar had expressed a desire to continue in business in the United States, and wanted to settle this case on the basis of the informal proposition previously suggested. However, early in September I had learned that two more 1120NB's were in our Operational Research office, that they had been filed by GALLIA, S.A., using the same address as Omar. I inspected these returns, which were also claims for refund of a credit from a regulated investment company, and found that the signer of these returns apparently had also signed the Omar return. As soon thereafter as possible I returned to Lehman Bros., in New York City, and asked for information about their account with Gallia. From Lehman Bros., I learned that the Gallia account had been opened on 23 December 1958, and that since October 1961 Gallia, following a plan of liquidation of its securities, had a cash balance of \$2,798,881.04 by February 1962, which, on 28 February 1962, was closed by issuance of a check to the First National City Bank for credit to their Montevideo office for the account of Gallia.

I was afraid to inquire about Omar's account after hearing this, for fear of arousing suspicion regarding the Service's prospective action. Accordingly, no inspection of Lehman's records regarding Omar was requested at that time (20 September 1962). I now know, of course, that Omar's holdings were already in process of being liquidated, and that large

sums of money had already been transferred out of Lehman Bros.

23 On my return to this office I began the preparation of the report of examination with a recommendation for a jeopardy assessment as a concomitant.

To the best of my knowledge Omar has filed no income tax returns, other than the Form 1120NB for 1957, referred to above.

William R. T. Gottlieb ✓

WILLIAM R. T. GOTTLIEB,

31 October 1962.

Sworn to and subscribed before me this 31st day of October, 1962.

✓
SARA B. McGRANN,

Notary Public.

My Commission Expires May 1, 1966.

24 Affidavit of John H. Walker in support of temporary restraining order:

I, John H. Walker, am an employee of the Office of Internal Operations, Internal Revenue Service, Washington, D.C., in the capacity of Internal Revenue Agent. I presently reside at 9109 Braeburn Drive, Annandale, Virginia.

During the week of October 22-26, 1962, in New York, N.Y., I examined certain records of the following brokerage firms:

Lazard Freres & Co., 44 Wall Street, New York 5, N.Y.,
Abraham & Co., 120 Broadway, New York 5, N.Y., and
H. Hentz & Co., 72 Wall Street, New York 5, N.Y.

for the purpose of verifying the accuracy and completeness of Forms 1042 and 1042S filed by those firms for years 1960 and/or 1961, and for the additional purpose of determining any assets held by those companies in the name of Omar, S.A., 12 de Diciembre 789, Montevideo, Uruguay, and of certain individuals known or suspected of having some connection with Omar, S.A. My general approach was to select certain accounts for close scrutiny, prearranging the selection so as to include the account of Omar, S.A., in the sample. The records checked included, variously, customers' accounts or ledger sheets, customers' statements, ownership record cards, and dividend and withholding tax records. As to Omar, S.A., I found that its assets, consisting of securities, held by these brokerage houses, had been substantially liquidated during 1961 and 1962 and the proceeds removed from the United States.

25 More specifically, as to each brokerage firm:

Lazard Freres & Co. records reveal that at October 24, 1962, the following securities were held for Omar, S.A.;
7,448 shares Mineral & Chemical-Philipp Corp.
29,837 shares Cemento Andino, S.A.
Bonds Cemento Andino, S.A. (5% due 10/15/74)
\$117,500.00

The records further revealed that on June 23, 1961, an amount of \$400,000.00 arising from sale of securities was paid to Omar, S.A. with the identification: "Pd. Belgian American Banking Corp. a/c Baco Italo Belge Montevideo for your account." (Note: "Moody's Bank and Finance Manual 1962" lists "Belgian-American Banking Corp. (New York)" at 52 Wall Street, New York 5, N.Y. No listing is shown for Baco (or Banco) Italo Belge, or Italian-Belgian Bank).

Also, the records showed that on December 8, 1961, an amount of \$1,640,000.00 was paid to Omar, S.A. with the identification: "Transfer by wire to 1st National City Bank ofn y (sic) Montevideo credit for your acct." (Note: "Moody's Bank and Finance Manual 1962" lists 1st National City Bank of New York with downtown headquarters at 55 Wall St., New York, N.Y. and uptown headquarters at 399 Park Ave., New York, N.Y.) This payment left a debit balance of \$783,375.92 in the account of Omar, S.A., which was cleared out by December 31, 1961 when the account showed a credit balance of \$13,159.00 by further sales of securities.

Abraham & Co. records reveal that the securities held by that firm for Omar, S.A. were sold in January and February 1961 and that on February 23, 1961, a remittance of 26 \$839,815.46 from those sales was made with the designation: "ck Belgian Am Bk ace Banco Italo Belga Montevideo." (Note: In this instance it appears that the "Belgian Am Bk" could be either of the following, listed in "Moody's Bank and Finance Manual 1962":

"Belgian-American Banking Corp. (New York), 52 Wall Street, New York, N.Y.," or,

"Belgian-American Bank & Trust Co. (N.Y.) (affiliated with Belgian-American Banking Corp., 52 Wall St., New York, N.Y.)")

H. Hentz & Co. records showed that Omar, S.A. had had a small account consisting of F. W. Woolworth stock which paid \$625.00 dividends for each of the first three quarters of 1961, but that account has been liquidated and no assets were held currently for Omar, S.A.

John H. Walker
JOHN H. WALKER,

October 31, 1962.

Sworn to and subscribed before me this 31st day of October, 1962.

SARA B. McGRANN,
Notary Public.

My Commission Expires May 1, 1966.

27 Affidavit of Forrest J. Kern in support of application for temporary restraining order:

I, Forrest J. Kern, Internal Revenue Agent, am an employee of Office of International Operations, Internal Revenue Service. I presently reside at 3614 Connecticut Avenue, N.W., Washington 8, D.C.

The withholding at source and certain customer account records of Lehman Brothers were examined during the week starting October 22, 1962. Purpose of the examination was to determine the accuracy of Form 1042 filed by Lehman Brothers and to determine the present assets of Omar, S.A., a Uruguayan corporation and certain individuals. The Form 1042 records of the withholding agent were inspected for 1960 and 1961. Form 1042 is the United States Annual Return of Income Tax to be Paid at Source.

The records of Lehman Brothers, 1 William Street, New York 4, N.Y., were examined on October 22, 23 and 24, 1962. Certain customers brokerage accounts, including Omar, S.A., were examined for the 1961 calendar year. The Omar account revealed numerous security sales on November 30, 1961 which increased their credit balance for this day from a low of \$87,132.70 to a high of 0608,593.49. On December 1, 1961, \$500,000.00 was withdrawn from the account. Notation opposite the withdrawal is, "Check to 1st National City Bank." The Omar account on September 28, 1962 indicates security sales totaling \$177,549.79 resulting in a corresponding credit balance. The securities and cash held by Lehman

28 Brothers for Omar, S.A. on September 28, 1962 are as follows:

1300 shares Eastern States Corp. 6 1/4 %	818,850.00
5300 shares Mineral & Chemical-Phillip Corp. 6 1/2 %	83,740.00
21M Pilcoflex, Inc. 6 1/2 % Sub notes 11 1 1/2 % Regd	24,000.00
16 Do Old	16,000.00
32 Do New	322,000.00
Cash	177,549.79
	<hr/> 8252,139.79

*Per New York Stock Exchange 10-25-62 closing.

Another account labeled Omar, S.A. #3 had "No securities long," as of September 28, 1962, with a \$64.34 credit balance.

The latter account had lesser activity than the former and it was liquidated since December 31, 1961,

Forrest J. Kern,

FORREST J. KERN,

October 31, 1962.

Sworn to and subscribed before me this 31st day of October, 1962.

SARA B. McGEOWN,

Notary Public.

My Commission Expires May 1, 1966.

29 [File endorsement omitted]

In the United States District Court
for the Southern District of New York

62 Civ. 3603

[Title omitted]

Affidavit of John B. Lowe—Filed November 14, 1962

State of New York, County of New York, ss.:

JOHN B. LOWE, being duly sworn, deposes and says:

I am the Comptroller of defendant Belgian-American Banking Corporation and defendant Belgian-American Bank & Trust Company.

I submit this affidavit on behalf of the said defendants in opposition to the motion of the plaintiff for an order enjoining the said defendants from selling, transferring, pledging, encumbering, disposing of, or distributing any property or rights to property of defendant Omar, S.A.

I have carefully checked the files and accounts of defendants Belgian-American Banking Corporation and Belgian-American Bank & Trust Company; and state as follows:

Neither Belgian-American Banking Corporation nor Belgian-American Bank & Trust Company has any property or rights to property belonging to defendant Omar, S.A. The
30 said banks presently have no accounts in the name of Omar, S.A. or in which our records indicate that Omar, S.A. has any right or interest. Neither of said banks has ever had any account of Omar, S.A.

I have read the papers submitted by the plaintiff to the Court in support of the motion for a restraining order, and particularly the two references to Belgian-American Banking Corporation. I have checked the files of Belgian-American Banking Corporation with respect to the two transactions mentioned, and state as follows:

1. According to the affidavit of John H. Walker, sworn to on October 31, 1962, \$400,000 was paid to Belgian-American Banking Corporation by Lazard Freres & Co. on June 23, 1961. I have found a record of this transaction in the files of Belgian-American Banking Corporation. On June 23, 1961, Lazard Freres paid to Belgian-American Banking Corporation \$400,000 for account of "Banco Italo-Belge, Montevideo for credit of Omar, S.A. under telegraphic advice". Banco Italo Belga S.A.

instructed Belgian-American Banking Corporation to transfer the \$400,000 to Société de Banque Suisse, Geneva. The said sum was transferred to Société de Banque Suisse on June 27, 1961.

2. The affidavit of Mr. Walker states that Abraham & Co. paid \$839,815.46 to Belgian-American Banking Corporation on February 23, 1961. I have checked the records of Belgian-American Banking Corporation with respect to this transaction. On February 27, 1961, Abraham & Co. delivered \$839,815.46 to Belgian-American Banking Corporation for account of "Banco Italo Belga, Montevideo for account of Omar, S.A. Geneva".

31 On March 3, 1961, pursuant to instructions received from Banco Italo Belga S.A., Belgian-American Banking Corporation transferred the said \$839,815.46 to Société de Banque Suisse.

It will appear from the above that in each of the two transactions cited by the plaintiff the funds were received by Belgian-American Banking Corporation but were immediately transferred pursuant to instructions of Banco Italo Belga S.A., to Société de Banque Suisse, Geneva.

I respectfully submit that there is no occasion for the entry of a restraining order against either Belgian-American Banking Corporation or Belgian-American Bank & Trust Company.

JOHN B. LOWE.

John B. Lowe.

Sworn to before me this 2nd day of November, 1962.

John J. Kennedy

JOHN J. KENNEDY

Notary Public, State of New York, No. 31-7231150,

Qualified in New York County. Commission Expires March 30, 1964.

32

[File endorsement omitted]

In the United States District Court for the Southern District
of New York

62 Civ. 3603

[Title omitted]

Affidavit of David A. Campbell—Filed November 14, 1962

State of New York, County of New York:

DAVID A. CAMPBELL, being duly sworn, says:

1. I am an Assistant Vice-President of First National City Bank and I have been associated with the bank for 42 years. I have spent more than 15 years as an officer or inspector of foreign branches of the bank and I am familiar with their manner of operation.

2. I am presently located at the bank's Uptown Headquarters at 399 Park Avenue, and I make this affidavit for submission in opposition to the motion of the United States for a temporary restraining order, as requested in the order to show cause which was served on the bank on October 31, 1962. On the same day the bank was also served with a notice of levy and a notice of Federal tax lien, referring to the same indebtedness of Omar, S.A. for taxes as that mentioned in the affidavits attached to the order to show cause.

3. First National City Bank is a national banking association having its principal office at 55 Wall Street in New York City, numerous branches in the State of New York, and 74 foreign branches located in 28 foreign countries throughout the world.

4. When the bank was served with the order to show cause, I caused an investigation to be made of the records of the bank in New York and found that Omar, S.A. is not a depositor of the bank either at Head Office or any domestic branch; and no record has been found in New York of any account at any foreign branch in this name.

5. Each foreign branch of the bank conducts its accounts independently of the account of other foreign branches and of its home office, as required by statute (Title 12, U.S. Code, § 604). Consequently, the bank does not have any records of

accounts at foreign branches and has no master list of depositors at foreign branches.

6. The affidavits attached to the order to show cause refer to records of Lazard Freres & Co. and of Lehman Brothers which mention First National City Bank in connection with a wire transfer and a check. No inferences can be drawn from those allegations, nor can the bank identify the transactions or the ultimate beneficiaries, without knowing to what bank the transfer instructions were given, and whether they were carried out; and without knowing on what bank the check was drawn, to which branch of First National City Bank the check was delivered, and what instructions accompanied the check.

DAVID A. CAMPBELL.

Sworn to before me November 8, 1962.

Barbara A. Flora.

BARBARA A. FLORA.

*Notary Public, State of New York, No. 03-1255940,
Qualified in Bronx County. Commission Expires
March 30, 1963.*

34 In the United States District Court for the
Southern District of New York

62 Civ. 3603

[Title omitted]

Affidavit of John F. Fitzgerald—Filed November 14, 1962

State of New York, County of New York:

JOHN F. FITZGERALD, being duly sworn, says:

1. I am a Vice President of First National City Trust Company, which is a national banking association with offices in the City of New York. The trust company has no foreign branches.

2. I make this affidavit for submission in opposition to the motion of the United States for a temporary injunction as requested in the order to show cause served on the trust company on October 31, 1962. On the same day the trust company was served with a notice of levy and a notice of Federal tax lien, referring to the same indebtedness of Omar, S.A. for taxes as that mentioned in the affidavit attached to the order to show cause.

3. An examination of the records of the trust company fails to reveal that the trust company holds any property of or is indebted to Omar, S.A.

JOHN F. FITZGERALD.

Sworn to before me November 8, 1962.

Katherine Wendel.

KATHERINE WENDEL.

Notary Public, State of New York, Qualified in New York County, No. 31-4222750, Cert. filed with City Register N.Y. County. Commission Expires March 30, 1963.

35 [Acknowledgment of service omitted in printing.]

In the United States District Court for the Southern District
of New York

62 Civil 3603

UNITED STATES OF AMERICA, PLAINTIFF

against

OMAR, S.A., A URUGUAYAN CORPORATION; LAZARD FRERES &
CO., LEHMAN BROTHERS, BELGIAN-AMERICAN BANKING
CORP., BELGIAN-AMERICAN BANK & TRUST CO., FIRST NA-
TIONAL CITY BANK OF NEW YORK AND FIRST NATIONAL CITY
TRUST CO., DEFENDANTS

Appearances:

Vincent L. Broderick, Esq., United States Attorney, Southern
District of New York, *Morton L. Ginsberg, Esq.*, Assistant
United States Attorney, Of Counsel.

Sullivan & Cromwell, Esqs., of New York, N.Y., Attorneys
for Belgian-American Banking Corp. and Belgian-American
Bank & Trust Company.

Shearman & Sterling, Esqs., of New York, N.Y., Attorneys
for First National City Bank and First National City Trust
Co., *Henry Harfield, Esq.*, Of Counsel.

DAWSON, D.J.:

This is a motion for a preliminary injunction to restrain the
defendants Lazard Freres & Co., Lehman Brothers, Belgian-
American Banking Corp., Belgian-American Bank & Trust Co.,
First National City Bank of New York and First National City
Trust Co. from selling, transferring, pledging, encumbering,
disposing of or distributing any property or rights to property
of defendant taxpayer Omar, S.A. A temporary restraining
order was issued against the defendants on October 31, 1962,
pursuant to Rule 65(b) of the Federal Rules of Civil Procedure.

It appears from the complaint and affidavits in support of
the motion that a corporate income tax deficiency totaling \$19,-
269.156.87 has been assessed against the defendant Omar, a
Uruguayan corporation. It further appears that this assess-

ment is secured by a federal tax lien upon all property and rights to property of the defendant taxpayer.

The plaintiff claims that the principal assets of the defendant corporation consist of sums, credits, stocks and bonds which are now held by the defendant banks and brokerage houses, or by their agents, branches, or nominees both within and without the United States. The plaintiff claims that disposi-

38 tion of the aforementioned assets might make its lawful rights therein unenforceable and that it would be irreparably injured by removal of any such assets outside the power of the court.

The affidavits of the plaintiff show an intent to liquidate, and in fact, substantial liquidations of the defendant Omar's accounts within the United States and transfer of the proceeds outside of the territorial jurisdiction have occurred. It therefore appears that there is a clear and present danger that plaintiff may be unable to recover upon defendant Omar's tax liability.

Section 7402(a) [26 U.S.C. § 7402] of the Internal Revenue Code, pursuant to which the Government's claim is brought, provides that the court shall issue such writs and orders as are appropriate to enforce the internal revenue laws. The court has the power, under Rule 65 of the Federal Rules of Civil Procedure, to grant a preliminary injunction and such power is discretionary. *American Visuals Corp. v. Holland*, 219 F. 2d 223, 224 (2d Cir. 1955), and cases cited therein.

The court is given the equitable power to issue a preliminary injunction so as to prevent irreparable injury pending
39 the determination of an action. *Ohio Oil Co. v. Conway*, 279 U.S. 813 (1928). In the instant case if the United States is successful in establishing defendant Omar's tax liability it will be needlessly injured if recovery is prevented by further removal of defendant's assets from the jurisdiction of the court. Such injury clearly authorizes the court to exercise its equitable power. *United States v. Ross*, 302 F. 2d 831 (2d Cir. 1962).

The defendant First National City Bank does not oppose the application of the injunction domestically, but argues that it should not be made applicable to its foreign branches. The crux of defendant's arguments is that the court has no power over property held or payable in branch banks outside the United States. This argument, though possibly well founded,

is not entirely to the point, since an injunction does not operate *in rem*. While it is true that the court may have no effective power over persons outside its jurisdiction, there is no problem where the persons to be enjoined are within its jurisdiction. Here the court has personal jurisdiction over the officers of the bank within the United States, and its power against them may be effectively exercised.

40 It is well established that once the court has obtained personal jurisdiction over a party it may compel performance of acts with respect to property located within or without its jurisdiction. *United States v. Ross*, 302 F. 2d 831 (2d Cir. 1962); *First National City Bank of N.Y. v. Internal Revenue Service*, 271 F. 2d 616 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960).

In the *First National Bank* case, *supra*, the question of the applicability of process against the foreign branches of a national bank against which such process was issued was clearly decided. In that case the Court of Appeals held that a national bank was required to produce records of its Panamanian branch pursuant to a summons served upon its home office.

The court should not act so as to violate laws of friendly foreign countries. *Inge v. Ferguson*, 282 F. 2d 149, 152 (2d Cir. 1960). Where it is shown that compliance with the court order would violate foreign law, then such order should be modified. *Application of Chase Manhattan Bank*, 297 F. 2d 611 (2d Cir. 1962). In the instant case it is indicated by one

defendant that there may be a violation of foreign law
41 if the assets of foreign branches are frozen, but no proof of any such law has been presented. It is proper therefore to permit the injunction to issue, and if it can be shown that compliance would violate local law the injunction may then be modified.

Although the defendants did not argue the control issue, this was the main brunt of plaintiff's memorandum. Suffice to say that if the court's order is violated and the defendants seek to escape punishment by claiming lack of authority over their foreign branches, it would be incumbent upon them to prove such defense to the satisfaction of the court.

The defendants Belgian-American Banking Corp., Belgian-American Bank & Trust Co., First National City Bank of New York and First National City Trust Co. have submitted affidavits that they do not now hold any property or rights to

property of defendant Omar. However, with the apparent exception of the First National City Trust Co. and Belgian-American Bank & Trust Co. all have had some connection with the transfer of defendant's property and there is no showing that their branches or agents do not at present hold any of defendant's assets. There is, therefore, sufficient reason to enjoin all the defendants except First National City Trust Co. and Belgian-American Bank & Trust Co.

42 During the oral argument on the motion the defendant Lehman Brothers raised the question of whether the accounts affected by the order could be indicated with particularity. It would seem the proposed order directed at the property of Omar, S.A. is of sufficient particularity on its face.

Submit injunction in accordance with this decision.

Dated: New York, N.Y., November 14, 1962.

ARCHIE O. DAWSON,
U.S.D.J.

43 In the United States District Court for the
Southern District of New York

62 Civ. 3603

UNITED STATES OF AMERICA, PLAINTIFF

against

OMAR, S.A., A URUGUAYAN CORPORATION; LAZARD FRERES &
CO.; LEHMAN BROTHERS; BELGIAN-AMERICAN BANKING
CORP.; BELGIAN-AMERICAN BANK & TRUST CO.; FIRST NA-
TIONAL CITY BANK OF NEW YORK; AND FIRST NATIONAL
CITY TRUST CO., DEFENDANTS

Injunction—November 20, 1962

Plaintiff, United States of America, having moved this Court, by an Order to Show Cause granted by this Court on October 31, 1962, for a preliminary injunction against defendants, and said application having come on to be heard before me on November 5, 1962, and plaintiff having appeared in support of said application by Vincent L. Broderick, Esq., United States Attorney for the Southern District of New York, Morton L. Ginsberg, of counsel, and defendant, Lehman Brothers, having appeared in opposition thereto by Simpson, Thacher & Bartlett, Esqs., and defendants, First National City Bank of New York and First National City Trust Co. having appeared by Shearman & Sterling, Esqs., and having submitted an affidavit and memorandum in opposition, and defendants, Belgian-American Banking Corp. and Belgian-American Bank & Trust Co. having appeared in opposition by Sullivan & Cromwell, Esqs., and having submitted an affidavit in opposition, and due deliberation thereon having been had, and this Court having rendered a decision contained in a written opinion
44 filed on November 14, 1962, which opinion fully sets forth the findings and reasons for the issuance of an injunction herein, and which opinion is herein incorporated by reference.

Now, on motion of Vincent L. Broderick, Esq., United States Attorney for the Southern District of New York, attorney for plaintiff, and upon plaintiff's verified complaint herein, plaintiff's application for the preliminary injunction, and the affida-

vits annexed thereto, and upon all papers heretofore filed herein, it is

ORDERED, that pending the determination of this action or until further order of this Court, the defendants, Lazard Frères & Co., Lehman Brothers, Belgian-American Banking Corp. and First National City Bank of New York, or any of them, be and they are hereby restrained from selling, transferring, pledging, encumbering, disposing of, or distributing any property or rights to property of Omar, S.A., including, but not limited to any sums, credits, stock, or bonds or any interest, dividends, or other earnings thereon now held for or for the account of the said Omar, S.A., by them or by any of their branches, agents, or nominees whether located within the United States or not and whether their branches, agents, or nominees are located within the United States or not.

Dated: New York, New York, November 20, 1962, 4:30 p.m.

ARCHIE O. DAWSON,

U.S.D.J.

[File endorsement omitted]

In the United States District Court
for the Southern District of New York

62 Civ. 3606

[Title omitted]

Notice of Appeal—Filed December 4, 1962

NOTICE IS HEREBY GIVEN that defendant First National City Bank, sued herein as "First National City Bank of New York", hereby appeals to the United States Court of Appeals for the Second Circuit from so much of the order herein, dated and entered November 20, 1962, granting an injunction, as relates to deposits of cash or securities standing on the books of, and payable or deliverable at, branches of First National City Bank located outside the United States.

Dated: New York, N.Y., December 4, 1962.

Yours, etc.,

SHEARMAN & STERLING,

Attorneys for Defendant, First National City Bank,

By CHARLES C. PARLIN, JR.,

*A Member of the Firm, 20 Exchange Place, New York
5, N.Y.*

TO: VINCENT BRODERICK, Esq.,

*United States Attorney for the Southern District of
New York, Attorney for Plaintiff, United States
Courthouse, Foley Square, New York, N.Y.*

47

[File endorsement omitted]

In the United States District Court
for the Southern District of New York

62 Civ. 3603

[Title omitted]

Amendment to complaint—Filed December 12, 1966.

The United States of America, plaintiff herein, by its attorney, Robert M. Morgenthau, United States Attorney for the Southern District of New York, for its amendment to the complaint herein alleges the following additional facts with respect to the enumerated paragraphs:

IV

(h) The defendant, Swiss Bank Corporation, is a Swiss corporation which has a New York agency which is located at 15 Nassau Street, New York, New York.

XIV

The defendant, Lehman Brothers, also presently holds stocks, bonds, and securities in the following four accounts under the name of the Swiss Bank Corporation, which, on information and belief, are nominee accounts which actually belong to the defendant, Omar, S.A.: Swiss Bank Corporation Ref Cologny; Swiss Bank Corporation Ref Veyrier; Swiss Bank Corporation Ref Veyrier S'D 92636; Swiss Bank Corporation Regular AC. The said stocks, bonds, and securities are encumbered by the federal tax lien against all property and rights to property of the defendant, Omar, S.A.

48 WHEREFORE, in addition to the relief prayed for in the complaint filed herein, plaintiff prays:

1. That this Court find, determine and adjudge that the property in the four accounts described in paragraph XIV hereinabove is the property of the defendant-taxpayer, Omar, S.A.;

2. That pending the determination of this suit, this Court enjoin the defendants Lehman Brothers and Swiss Bank Corporation from selling, transferring, pledging, disposing of or distributing any of the stocks, bonds, and securities or the divi-

dends interest, or other earnings thereon in the four accounts described in paragraph XIV hereinabove;

3. That this Court order the foreclosure of the plaintiff's lien on the property in the four accounts described in paragraph XIV hereinabove and that this Court order the said property to be sold at a judicial sale in accordance with law and the proceeds therefrom to be turned over to this plaintiff in satisfaction of this plaintiff's lien on said property;

4. That this Court grant this plaintiff such other and further relief that it deems is just, equitable and proper in the premises including costs.

ROBERT M. MORGENTHAU,
*United States Attorney for the Southern District of
New York; Attorney for Plaintiff.*

By MORTON L. GINSBERG,
*Assistant United States Attorney, Office and Post
Office Address: United States Court House, Foley
Square, New York 6, N.Y., Tel. COrtlandt 7-7100*
49 [Affidavit of mailing omitted in printing.]
50 [Clerk's Certificate to foregoing transcript omitted
in printing.]

51

In the United States Court of Appeals
for the Second Circuit

No. 307—September Term, 1962

Argued April 11, 1963

Docket No. 27980

UNITED STATES OF AMERICA, APPELLEE

v.

FIRST NATIONAL CITY BANK, APPELLANT

and

OMAR, S. A., A URUGUAYAN CORPORATION; LAZARD FRERES &
CO.; LEHMAN BROTHERS; BELGIAN-AMERICAN BANKING
CORP.; BELGIAN-AMERICAN BANK AND TRUST CO.; AND
FIRST NATIONAL CITY TRUST CO., DEFENDANTS

Before MOORE, FRIENDLY and HAYS, Circuit Judges

Appeal from an injunction issued by the United States District Court for the Southern District of New York, Archie O. Dawson, Judge, enjoining the transfer of funds held by the defendant's branch bank abroad for the account of an alleged delinquent taxpayer. Vacated in part and remanded.

52 *Henry Harfield* of Shearman & Sterling (Herman E. Compter and John E. Hoffman, Jr., of counsel), for appellant.

Louis F. Oberdorfer, Assistant Attorney General (Robert M. Morgenthau, United States Attorney, Southern District of New York, Morton L. Ginsberg and Robert Arum, Assistant United States Attorneys, Harold C. Wilkenfeld, Michael A. Mulrone and John J. McCarthy, Attorneys, Department of Justice, Washington, D.C., of counsel), for appellee.

Opinion—Decided June 26, 1963

MOORE, Circuit Judge: This appeal presents an important question concerning the scope of an injunction against an American bank affecting deposits that may be held for the credit of an alleged delinquent taxpayer in a branch bank outside of the United States.

The taxpayer involved is Omar, S.A., a Uruguayan corporation. An investigation into Omar's affairs in this country revealed the likelihood that Omar was indebted to the United

States for unpaid taxes and that sometime in June, 1961, Omar commenced a program of liquidating its holdings of securities in this country and transferring the receipts to Uruguay.¹

53 On October 31, 1962, the Internal Revenue Commissioner caused the issuance of jeopardy assessments against the taxpayer for deficiencies in corporate income tax totaling about \$19,300,000 for the fiscal years March 31, 1955, through 1961, inclusive. Notice of the assessment and demand for payment was sent to Omar.

On the same day the United States filed a complaint in the District Court for the Southern District of New York naming as defendants Omar S.A.; two banks, The First National City Bank of New York and Belgian-American Banking Corp.; two brokerage houses, Lazard Freres & Co. and Lehman Bros.; and two trust companies, First National City Trust Co. and Belgian-American Bank & Trust Co. The complaint alleged that defendants, other than Omar, held sums for the account of or to the credit of Omar and prayed that the District Court adjudge Omar indebted to the government for unpaid taxes; find a valid lien existing in favor of the plaintiff on all property or rights to property belonging to the defendant Omar; enjoin the other defendants from in any way transferring or disposing of such property; order the return of all such property to the jurisdiction of the court; and order the foreclosure of plaintiff's lien on any such property held by defendants and its judicial sale. No personal jurisdiction has been obtained over the taxpayer Omar. An application for a temporary restraining order was granted on October 31, 1962, and on November 20, 1962, the district court, after hearing both sides, granted a preliminary injunction enjoining certain defendants from transferring or disposing of any property or rights to property, whether or not located within the United States, held

An affidavit submitted by John H. Walker, an employee of the Office of International Operations, Internal Revenue Service, states that an investigation of the records of Lazard Freres & Co. revealed that on June 23, 1961, Omar was paid \$400,000 with the notation, "Pd Belgian American Banking Corp. à c Baco Italo Belge Montevideo for your account" and on December 8, 1961, \$1,640,000 was paid to Omar with the notation, "Transfer by wire to 1st National City Bank (ofn y (sic) Montevideo credit for your account". An affidavit submitted by Forrest J. Kern of the same office reveals a withdrawal from Omar's account with Lehman Brothers of \$500,000 with the notation "check to 1st National City Bank."

for the account of Omar by defendants, their branches, agents or nominees.²

54 Defendant First National City Bank of New York [hereinafter referred to as "Citibank"] appeals from so much of the order as applies to property or rights to property that it may hold in branch banks outside the United States. Citibank's argument on appeal is that under New York law, a deposit in its branch bank would not be collectible by Omar in New York, Omar's sole right being against any branch bank in which such deposits have been made; that, there being no debt in the United States, there is no property or right to property to which a federal lien can attach; and that the district court was without jurisdiction to issue an injunction affecting any such deposits. The Government in turn asserts that Citibank is itself the debtor and that a lien attached to this debt in New York; that the federal lien attached even if the situs of the debt be outside the United States; and that in any event, personal jurisdiction over Citibank was sufficient basis for the issuance of the injunction.

I

To put these contentions in their proper perspective, a short summary of the enforcement provisions of the Internal Revenue Code of 1954 and judicial decisions thereunder is appropriate. The Code provides several alternative methods for the collection of the revenue from those who neglect 55 or refuse to pay.³ Sections 6321 and 6322, 28 U.S.C., 56 provide that a lien upon "all property and rights to

² The defendants Belgian-American Banking Corp. and First National City Trust Co. filed uncontroverted affidavits alleging that they held no property or rights to property belonging to the taxpayer. Therefore, they were excluded from the order issued by the court.

³ Jurisdiction over this appeal from the granting of a preliminary injunction lies under 28 U.S.C. § 1292(1). In reviewing the preliminary injunction, this court may inquire into the jurisdiction of the district court as well as into the adequacy of the complaint for the injunction cannot stand if the complaint itself cannot stand. *Decker v. Independence Corp.*, 311 U.S. 282 (1940); *John Hancock Mutual Life Ins. Co. v. Kraft*, 200 F. 2d 952 (2d Cir. 1953); *Pong-Tou Moir v. Republic of China*, 201 F. 2d 195 (1st Cir. 1952), cert. denied, 345 U.S. 925 (1953); *Eighth Regional War Labor Board v. Humble Oil & Refining Co.*, 145 F. 2d 462 (5th Cir. 1944), cert. denied, 325 U.S. 883 (1945).

⁴ The relevant sections provide:

property" belonging to a taxpayer who has refused or neglected to pay any tax arises at the time an assessment is made. In addition, the Service is authorized to collect such tax by

§ 6321. Lien for Taxes.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

§ 6322. Period of Lien.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

§ 6331. Levy and Distraint.

(a) Authority of Secretary or Delegate.—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. • • • If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

§ 6332. Surrender of Property Subject to Levy.

(a) Requirement.—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) Penalty for Violation.—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy.

§ 7402. Jurisdiction of District Courts.

(a) To Issue Orders, Processes, and Judgments.—The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of ne exeat republica, orders appointing receivers, and such other

levy on all property or rights to property either belonging to the taxpayer or on which there is a lien. 28 U.S.C. § 6331(a). Any person in possession of property or rights to property on which a levy has been made who fails to surrender such property to the Service on demand is personally liable in a sum equal to the value of the property or rights not surrendered. 28 U.S.C. § 6332(b).

The statutory scheme also provides for resort to the courts if necessary. Section 7403(a) permits the filing of a civil action in the district court to enforce a federal tax lien, whether or not levy has also been made. In addition, the district courts have jurisdiction to issue all orders or
57 injunctions necessary or appropriate for the enforcement of the internal revenue laws. 28 U.S.C. § 7402(a).

The effect of the foregoing provisions is to create a statutory attachment or garnishment without requiring resort to the court processes normally necessary in ordinary garnishment proceedings. *United States v. Edland*, 223 F. 2d 118 (4th Cir. 1955). Where for some reason personal jurisdiction over the delinquent taxpayer is unobtainable, the Service is able to proceed in actions quasi in rem to enforce its lien on specific property belonging to the taxpayer within the jurisdiction of the court. See *United States v. Balanowski*, 236 F. 2d 298 (2d Cir. 1956), cert. denied, 352 U.S. 968 (1957).

The crucial question here is whether appellant holds property or rights to property of the taxpayer Omar subject to the jurisdiction of the district court.³ The nature of Omar's right against Citibank arising out of a deposit made in Citibank's

orders and processes, and to render such judgment and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

§ 7403. Action to Enforce Lien or to Subject Property to Payment of Tax.

(a) Filing.—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title or interest, to the payment of such tax or liability.

³ For the sake of brevity, future references in this opinion to "property belonging to the taxpayer" are to be taken to include "rights to property" as well.

Montevideo branch bank is to be determined by state law for the tax lien statute "creates no property rights but merely attaches consequences, federally defined, to rights created under state law." *United States v. Bess*, 357 U.S. 51, 55 (1958); see *Aquilino v. United States*, 363 U.S. 509 (1960); *Raffaele v. Granger*, 196 F. 2d 620 (3d Cir. 1952).

The proper place to sue to enforce a lien is in the district in which the property is located. *United States v. Dallas National Bank*, 152 F. 2d 582 (5th Cir. 1945). Absent jurisdiction over the person of Omar, this action can proceed only on the ground that Citibank's debt to Omar is within the jurisdiction of the district court. *Hanson v. Denckla*, 357

U.S. 235 (1950), made explicit what had been assumed
58 since *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877), namely, that a state has no right "to enter a judgment purporting to extinguish the interest of such a person [over whom it has no personal jurisdiction] in property over which the court has no jurisdiction," 357 U.S. at 250.

The Government argues that the situs of the debt is irrelevant because a bank account creates a debtor-creditor relationship which is subject to levy, *United States v. Bowery Savings Bank*, 297 F. 2d 380 (2d Cir. 1961); *United States v. Manufacturers Trust Co.*, 198 F. 2d 366 (2d Cir. 1952); *United States v. Third National Bank & Trust Co.*, 111 F. Supp. 152 (M. D. Pa. 1953), and that, therefore, jurisdiction exists in the district court because the "obligation of the debtor to pay clings to and accompanies him wherever he goes." *Harris v. Balk*, 198 U.S. 215, 222 (1905). Although the Government correctly characterizes the relationship between bank and depositor, its argument merely begs the determinative question, namely, who is the actual debtor in this case, the appellant or its branch banks. The nature of garnishment proceedings is such that the garnishor obtains no greater right against the garnishee than the garnishee's creditor had. *Harris v. Balk*, *supra*, at 222; *Karno-Smith Co. v. Maloney*, 112 F. 2d 690, 692 (3d Cir. 1940); *Wheeler v. Thomas*, 31 F. Supp. 702 (D.C.D.C. 1940). But cf. *United States v. Manufacturers Trust Co.*, *supra*. Thus, only if Omar could sue appellant in New York to recover his deposit, can the Government, as Omar's creditor, sue in New York. Inquiry, therefore, must be made into the nature of the debt owed to Omar under state law.

A review of the New York cases indicates a consistent line of authority holding that accounts in a foreign branch bank are not subject to attachment or execution by the process of a

59 New York court served in New York on a main office, branch or agency of the bank. See Comment, Garnishment of Branch Banks, 56 Mich. L. Rev., 90 (1957). This doctrine finds its inception in English law. An important case is *Richardson v. Richardson & National Bank of India, Ltd.*, [1927] Probate 228, 137 L.T. R492, 163 L.T. 450, involving an attempt by a wife to obtain a garnishee order against the account of her husband in a bank whose head office was in London. The question presented was whether the garnishee order could extend to deposits to the husband's credit in branch banks in Kenya and Tanganyika. The Court, after reviewing prior English authorities such as *Woodland v. Fear*, 7 W. & B. 519 (1857) and *Rex v. Lovitt*, [1912] A.C. 212 (P.C.), found that the contractual obligation between bank and customer contains certain implied terms, these being that (1) the promise of the bank is to repay at the branch where the account is kept; and (2) the bank is not required to pay until payment is demanded at the branch where the account is kept. Therefore, since the debt of the bank at its main office did not extend to deposits in its branch banks, it was not property within the jurisdiction of the English court and was not subject to attachment there.

An early case in New York *Chrzanowska v. Corn Exchange Bank*, 173 App. Div. 285, 159 N.Y.S. 385 (1st Dep't 1916), affirmed, 225 N.Y. 728, 122 N.E. 877 (1919), dealing with the relationship between branch banks, established the proposition that domestic branches within the same city were to be regarded as distinct and separate entities and that deposits made in branch banks are payable there and only there. The court said: "the different branches were as separate and distinct from one another as from any other bank." 173 App. Div. at 291, 159 N.Y.S. at 388. But see *Konstantinidis v. The S.S.*

60 *Tarsus*, 196 F. Supp. 433 (E.D.N.Y. 1961). This view was thereafter applied to foreign branches with respect to the collection of forwarded paper, the court stating that "the branch is not a mere 'teller's window'; it is a separate business entity." *Pan-American Bank & Trust Co. v. National City Bank*, 6 F. 2d 762, 767 (2d Cir.), cert. denied, 269 U.S. 554 (1925). Furthermore, the contract between the

bank and a depositor in a foreign branch is to pay in the currency of the branch in which the deposit is made. *Solokoff v. National City Bank*, 250 N.Y. 69, 164 N.E. 745 (1928); *Zimmerman v. Hicks*, 7 F. 2d 443 (2d Cir. 1925), affirmed sub nom. *Zimmermann v. Sutherland*, 274 U.S. 253 (1926). The separate entity theory is subject only to the exception that if the branch be closed or if demand for payment is refused at the branch, an action against the main office will lie. *Solokoff v. National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924); *Richardson v. Richardson & National Bank of India, Ltd.*, supra.⁶ *Bluebird Undergarment Corp. v. Gomez*, 139 Misc. 742, 249 N.Y.S. 319 (City Ct., N.Y. Cty. 1931), dealt with the scope of a warrant of attachment served on the main office of a bank located in New York involving an account of a defendant outside the United States. The issue arose on a motion to compel the bank to produce information showing whether the defendant had any sums on account in the bank's Puerto Rico branch. Relying on the separate entity theory espoused in *Richardson* and *Chrzanowska*, the court found that the defendant could not have commenced an action in New York to recover his deposit in Puerto Rico. The court in its opinion said:

61 "Not only are branch banks separate entities, but deposits made in a branch bank are payable there and there only * * *. A branch bank being separately indebted to its depositor, the existing obligation lies primarily between such branch bank and its depositor. The conclusion follows as a necessary corollary that the debt owed by a branch finds its situs within the territorial jurisdiction of such branch."

139 Misc. at 744, 249 N.Y.S. at 321-22. See also *Phillip v. Chase National Bank*, 34 N.Y.S. 2d 465 (Sup. Ct., N.Y. Cty. 1942); *Walsh v. Bustos*, 46 N.Y.S. 2d 240 (City Ct., N.Y. Cty. 1943).

In *Clinton Trust Co. v. Compania Azucarera Central Mabay S.A.*, 172 Misc. 148, 14 N.Y.S. 2d 743 (Sup. Ct., N.Y. Cty., affirmed without opinion, 258 App. Div. 780 (1st Dep't 1939)), the court was faced with an application to direct Chase Na-

⁶ For a discussion of the legal problems arising out of the growth of branch banking, see Fordham, *Branch Banks as Separate Entities*, 31 Colum. L. Rev. 975 (1931).

tional Bank and the Royal Bank of Canada to answer certain questions concerning the status of deposit accounts of the defendant in their branch banks in Havana, Cuba. In denying the application, the court relied on the authorities already discussed, but found additional support for its conclusion with respect to Chase in 12 U.S.C. § 604. That section provides that:

"Every national banking association operating foreign branches shall conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office, and shall at the end of each fiscal period transfer to its general ledger the profit or loss accrued at each branch as a separate item."

See also *Pan-American Bank & Trust Co. v. National City Bank*, *supra*.

62 Later cases in New York, while still resting on the separate entity theory, have stressed the policy justifications underlying the rule. In *Cronan v. Schilling*, 100 N.Y.S. 2d 474, 476 (Sup. Ct. N.Y. Cty. 1950), the Court stated:

"Unless each branch of a bank is treated as a separate entity for attachment purposes, no branch could safely pay a check drawn by its depositor without checking all other branches and the main office to make sure that no warrant of attachment had been served upon any of them. Each time a warrant of attachment is served upon one branch, every other branch and the main office would have to be notified. This would place an intolerable burden upon banking and commerce, particularly where the branches are numerous, as is often the case."

Similarly in *Newton-Jackson Co. v. Animashun*, 148 N.Y.S. 2d 66 (Sup. Ct., Nassau Cty. 1955), the court found that the rule rested on two grounds: (1) the situs of the debt is at the branch where the account is carried; (2) the crippling effect a contrary rule would have on banking practice involving branch banks in distant corners of the globe.

Most recently, the rule has received the sanction of the New York Court of Appeals in *McCloskey v. Chase Manhattan Bank*, 11 N.Y. 2d 936 (1962), which was an action to recover (by attachment) in New York moneys payable at a branch of

the New York bank in Germany. The funds were held not to be subject to New York attachment. The Court of Appeals, without opinion, affirmed the judgment granting defendant's motion to dismiss the complaint.

The Government seeks to vitiate the effect of these cases by contending that they relate merely to state-imposed
63 restrictions upon the remedy of a creditor of a depositor, stressing the fact that none of these cases involved an actual attempt by a depositor to demand payment in New York of a deposit made in a branch bank abroad.⁷ Relying on *United States v. Bess*, *supra*, it argues that state-created restrictions on enforcement remedies are inoperative to prevent the attachment or enforcement of federal tax liens.⁸

This argument fails to recognize the full import of the New York cases. The reason that attachment fails is in no way due to any peculiar vagaries in the attachment remedy itself; rather, it is the result of the New York substantive rule that there is no obligation due at the main branch to a depositor
64 in another branch and, therefore, no property subject to attachment within the jurisdiction of the New York courts.⁹ Furthermore, the policy justifications offered

⁷ *Vargo v. Credit-Suisse*, 2 App. Div. 2d 596, 157 N.Y.S. 2d 391 (1st Dep't 1956) is urged by the Government as authority for the proposition that a depositor may sue a New York branch of a foreign bank with respect to an account in another foreign branch of the bank. However that case involved a suit for breach of contract arising out of the alleged wrongful transfer of funds deposited in a Hungarian branch. The sole question decided there was that § 200, sub. 3 of the New York Banking Law, did not prevent a suit against an agent of a foreign bank in New York where the cause of action arose outside of New York. In addition, although the question was not reached by the court, it is possible that the action might be governed by the rule of *Solokoff v. National City Bank*, 230 N.Y. 158, 145 N.E. 917 (1924), which permitted an action against the main office where payment had been refused at a branch office. Here, since the funds had allegedly been transferred, no demand would even be necessary. Cf. *Solokoff v. National City Bank*, 250 N.Y. 69, 80-81, 164 N.E. 745, 749 (1928).

⁸ In *Bess* after holding that the federal lien did not attach to the proceeds of an insurance policy on the life of the insured but only to the cash surrender value of the policy, the Court rejected the contention that no federal lien attached to the cash surrender value because under state law that property right was not subject to creditors' liens. Once it was determined under state law that a property right existed in the insured taxpayer, the state attachment law became irrelevant.

⁹ Further support for this conclusion can be garnered from the refusal of the New York courts to extend § 916(3) of the New York Civil Practice

to support the rule rest not on the inappropriateness of attachment as a remedy, but on the more fundamental notion that to require any branch to respond to the demand of a depositor in another branch anywhere in the world would impose an intolerable burden on the banking community. This would be the result of not only the impracticality of requiring constant transmission of reports on the status of accounts in one branch to all other branches, but on the complications that arise out of the fact that different branches may be subject to the laws of other countries and may be dealing in different currencies.¹⁰

65 The Government also places some reliance on the rejection of the separate entity theory, based on 12 U.S.C. § 604, in *First National City Bank v. Internal Revenue Service*, 271 F. 2d 616 (2d Cir. 1959). There this Court held that this section was not a bar to requiring the bank to produce bank records, physically located in its branch bank in Panama, relating to an account of a Panama corporation. There are two ready answers to this contention. In the first place, in only one New York case has there even been partial reliance on 12 U.S.C. § 604. See *Clinton Trust Co. v. Campana Azucarera Central Mabay S.A.*, *supra*. Secondly, *First Na-*

Act to these cases. See *O'ronan v. Schilling*, 100 N.Y.S. 2d 474 (Sup. Ct., N.Y. Cty. 1950); Casenote, Branch Banking as Separate Entity for Attachment Purposes, 48 Cornell L.Q. 333 (1963). That section provides for attachment upon:

"a debt, arising under or on account of a contract . . . due . . . to a resident or non-resident person or corporation, from a resident or non-resident person or corporation, upon whom or which service of process may be had within the county, provided that an action could be maintained by the defendant within the state for the recovery of such debt at the maturity thereof or where the debt consists of a deposit of money not to be repaid at a fixed time but only upon special demand, that such demand therefor could be duly made by defendant within the state."

If the substantive law of the state were, as the Government urges, that a depositor in a foreign branch could demand payment at a New York branch, then § 916(3) by its terms would be applicable to the case of attachment by a creditor of the depositor. The section is, however, inapplicable only because the state rule is that a depositor could not successfully demand payment in New York.

* Problems arising out of the fact that different branches deal with different currencies include questions of the possible necessity of securing a license in order to convert the foreign currency into American dollars, the effective date for determination of the rate of exchange and the selection of the proper exchange rate when multiple exchange rates are in force.

tional City did not reject the separate entity theory for all purposes and under all circumstances. Thus, this Court there recognized that a prior decision in this Circuit, *Pan-American Bank & Trust Co. v. National City Bank*, *supra*, which relied in part on § 604, had held that "in various commercial transactions between a branch bank and its home office the rights involved are to be determined as though the branch was acting at arm's length as an independent entity." *First National City Bank v. Internal Revenue Service*, *supra*, at 619. The court in no way intimated disapproval of the *Pan-American* opinion; it merely found that the case at bar, involving a question of whether the main office had sufficient control over its branch to order the return of certain records for examination, was distinguishable from the arm's length transaction involved in *Pan-American*.

II

The court below rested its decision to issue the injunction on the grounds that the court having personal jurisdiction over Citibank, it had the power to compel the performance of 66 acts respecting property situated outside its jurisdiction.

The district court relied on cases sustaining the power of the district court to require the production of records held in branch banks pursuant to a summons served upon its home office.¹¹ *First National City Bank v. Internal Revenue Service*, *supra*; *Application of Chase Manhattan Bank*, 297 F. 2d 611 (2d Cir. 1962). But *cf. Ings v. Ferguson*, 282 F. 2d 149 (2d Cir. 1960). Furthermore, in *United States v. Ross*, 302 F. 2d 831 (2d Cir. 1962) the power of a district court to order the taxpayer, over whom personal jurisdiction had been obtained,

¹¹ A recurring problem in these cases is the effect that is to be given to the fact that compliance with the production order may subject the party or witness to civil liability or criminal penalties under the law of the country in which the records are located. Under these circumstances, the burden of proceeding by appropriate process in the courts of the foreign country shifts to the party seeking production, with some vague duty on the part of the person subpoenaed to cooperate in this endeavor. See Note, *Subpoena of Documents Located in Foreign Jurisdiction Where Law of Situs Prohibits Removal*, 37 N.Y.U.L. Rev. 295 (1962). Similar assertions were made by the defendants in this case. The court below held that defendants had failed to offer any proof on the applicable foreign law, but if it were later shown that compliance would violate foreign law, the injunction could be modified accordingly.

to transfer stock certificates, located in the Bahamas, to a receiver appointed by the district court, was upheld. See also *S.E.C. v. Minas de Artemisa, S.A.*, 150 F. 2d 215 (9th Cir. 1945).

Here, however, the absence of personal jurisdiction over the taxpayer Omar is a crucial factor in distinguishing the *Ross* case. Since Omar was not before the court, no personal judgment could have been rendered against it. Only a judgment *quasi in rem* extinguishing Omar's rights in any property it might have within the district court's jurisdiction would be valid. A prerequisite to such jurisdiction must be power over the *res*. *Hanson v. Denckla, supra*.

Although Citibank might be liable personally for wrongfully refusing to surrender property on which the Government holds a lien, 28 U.S.C. § 6332, any such action would have to be predicated on the existence of a valid lien. See 28 U.S.C. § 7403. Since the property is without the *United States*, no valid lien ever attached.

The Government, however, asserts that the words of the tax lien statute, 28 U.S.C. § 6321, have a global application and that the lien attaches to property of the taxpayer anywhere in the world. If taken literally, the statute might be susceptible to this interpretation, but to so construe it would do violence to the settled principle of statutory construction that legislation is meant to apply only within the territorial jurisdiction of the United States unless a contrary intention appears. *Blackmer v. United States*, 284 U.S. 421, 437 (1932); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949); *Lauritzen v. Larsen*, 345 U.S. 571, 577 (1953); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 371 U.S. 10, 21-22 (1963). The Supreme Court has made manifest its reluctance to read an extraterritorial force into statutes when to do so would extend coverage beyond places over which the United States has legislative control. *Foley Bros., Inc. v. Filardo, supra*, or would interfere with the rights of other nations, *Lauritzen v. Larsen, supra*.

It has long been a general rule that one sovereignty may not maintain an action in the courts of another state for the collection of a tax claim. *Government of India v. Taylor*, [1955] A.C. 516; *Moore v. Mitchell*, 28 F. 2d 997 (S.D.N.Y. 1928), *aff'd*, 30 F. 2d 600 (2d Cir. 1929), *aff'd* on other grounds, 281 U.S. 18 (1930); *State of Colorado v. Harbeck*, 232 N.Y. 71,

133 N.E. 357 (1921). *Contra, State ex rel. Oklahoma Tax Comm'n v. Rodgers*, 238 Mo. App. 1115, 193 S.W. 2d 919 (1946). The nations of the world have only recently begun to deal with the problem of extraterritorial collection of tax revenues through the medium of negotiated tax treaties providing for mutual cooperation.¹² See Note, International Enforcement of Tax Claims, 50 Colum. L. Rev. 490 (1950). Absent an explicit indication to the contrary, there should not be attributed to Congress an intent to give the courts of this nation, in this highly sensitive area of inter-governmental relations, the power to affect rights to property wherever located in the world. The apparent necessity of tax treaties underscores the conclusion that Congress has seen fit to handle this problem in another manner.

III

Although the result here is in large part dictated by a state rule having its genesis in policy considerations having little to do with the collection of the revenue, application of that rule to the facts here comports with sound reason and public policy. Unfortunate as it may be that Omar will be able to escape, at least partially, from a possible tax liability involving substantial sums, in the long run it is unlikely that a different rule here would provide much consolation to the Internal Revenue Service. The artful tax dodger would not have to be too sophisticated to realize that all he need do to escape liability is place his deposits in a bank of local origin that is beyond the power of our courts. This would lead only to harmful consequences for our banking system abroad without any concomitant benefits here at home.

In addition, the rule suggested by the Government would have to work both ways. As yet, our courts have been faced only with cases seeking to attach deposits in foreign branches of American banks by service on the home-office here, 69 *Bluebird Undergarment Corp. v. Gomez*, *supra*; *Clinton Trust Co. v. Compania Azucarera Central Mabay S.A.*, *supra*; *Phillips v. Chase National Bank*, *supra*; *McCloskey v. Chase Manhattan Bank*, *supra*, and others seeking to attach deposits in foreign banks by service on a branch of such a bank doing business in New York. *Clinton Trust Co. v. Compania*

¹² No such treaty exists with Uruguay. 4 CCH Fed. Tax Rep. ¶ 4281.

Azucarera Central Mabay S.A., supra; Phillips v. Chase National Bank, supra; McCloskey v. Chase Manhattan Bank, supra, and others seeking to attach deposits in foreign banks by service on a branch of such a bank doing business in New York. *Clinton Trust Co. v. Compania Azucacera Central Mabay S.A., supra; Welsh v. Bustos, supra; Cronan v. Schilling, supra; Neton Jackson Co. v. Animashun, supra.* However, it is inconceivable that the issuance of an injunction by a court of a foreign country against an American branch bank affecting the accounts or activities of the head office in the United States would be looked upon with favor. The untoward difficulties and potential conflict between the laws of different nations that such a doctrine would produce militate against giving it support here.

The court concludes that the injunction issued by the district court was beyond its jurisdiction as to deposits held abroad that are collectible only outside the United States. The record, however, does not make clear whether any special arrangements may have existed between Citibank and Omar making the deposit payable, not in pesos at Montevideo, but in dollars in New York. The injunction should therefore be modified in such a way as to preserve any rights of the Government should it appear that Omar's accounts were in fact payable in New York.

Vacated in part and remanded for modification of the injunction in conformity with this opinion.

70 HAYS, Circuit Judge, dissenting:

In his learned opinion my brother Moore has almost completely lost sight of what it is that we are asked to review. The extensive dissertation on the nature and characteristics of attachable or lienable property under New York law is an admirable display of my colleague's well known erudition and of his customary careful and exhaustive research. But it has little if anything to do with the case in hand.

The order appealed from was issued by the district court under the authority of § 7402(a) of the Internal Revenue Code of 1954 which provides:

"The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appoint-

ing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws."

The order of the district court does not purport to establish or enforce any lien on any property or to direct the payment of any sums whatever. It is a simple order, confined to a direction to the appellant (and certain others) to keep the property of the taxpayer which they now hold. The order reads:

"ORDERED, that pending the determination of this action or until further order of this Court, the defendants, Lazard Freres & Co., Lehman Brothers, 71 Belgian-American Banking Corp. and First National City Bank of New York, or any of them, be and they are hereby restrained from selling, transferring, pledging, encumbering, disposing of, or distributing any property or rights to property of Omar, S.A., including, but not limited to, any sums, credits, stock, or bonds or any interest, dividends, or other earnings thereon now held for or for the account of the said Omar, S.A., by them or by any of their branches, agents, or nominees whether located within the United States or not and whether their branches, agents, or nominees are located within the United States or not."

The record indicates that the district court was completely justified in issuing the injunction. In May 1962 counsel for taxpayer told government representatives that if the government should attempt to establish tax liability, taxpayer would liquidate its holdings in the United States. Later one of taxpayer's directors came to the United States and began a systematic liquidation of those holdings. By October 31, 1962, when the Commissioner assessed jeopardy assessments totaling \$19,300,000, taxpayer had already transferred at least \$2,300,000 out of the country.

The order is merely a preliminary injunction to prevent further dissipation of taxpayer's assets. The district court did not determine, nor was there any occasion for its determining, whether the government's lien attached to all the

property immobilized by the order, or what part of such property the government would be able to get possession of in the later stages of this proceeding or in some other proceeding.

There is no doubt that the district court, having in personam jurisdiction over appellant, had the power to issue its order.

Indeed appellant does not deny such power except
72 with respect to property of the taxpayer held by appellant's foreign branches. The district court has the power to order the appellant over whom it has personal jurisdiction to act or to refrain from acting both within and without the territorial jurisdiction of the court. *United States v. Ross*, 302 F. 2d 831 (2d Cir. 1962). It is of no consequence, as the majority believes, that the court does not have jurisdiction over Omar. The court's jurisdiction is not in any sense jurisdiction over the res, it is jurisdiction over the person of the appellant.

The present issue as to property of the taxpayer which is held by appellant's foreign branches is not, as the majority believes, whether that property can be recovered in the pending proceeding. The only issue is whether appellant has power to carry out the order of the court with respect to that property. It is clear that appellant has that power (*First National City Bank v. Internal Revenue Service*, 271 F. 2d 616 (2d Cir. 1959), cert. denied 361 U.S. 948 (1960)), and indeed appellant does not deny that it could prevent its foreign branches from releasing property to the taxpayer.

Appellant cannot at this stage be permitted to argue that, although it does not deny that it could effectively prevent its foreign branches from paying out money to the taxpayer, it cannot be required to do so because the government may not be able to recover that money in the present suit. Neither the district court nor this court can or should decide on the present record that the government has no recourse by which it could ever recover the property which the government seeks to protect from dissipation. Even if it should be granted that in the present proceeding the government could not recover property of the taxpayer held by a foreign branch, is this court now prepared to hold, for example, that there is no possibility
73 that a receiver appointed under the authority of § 7402(a) would be able to proceed against taxpayer's property under any circumstances or anywhere other than New York? The majority's reference to the absence of a

tax treaty with Uruguay is irrelevant since not only is the absence of such a treaty not dispositive, but there is nothing in the record before us to show that foreign branches of appellant other than that in Montevideo do not hold property of the taxpayer.

The result of the present decision is a wholly unwarranted limitation on the government's power to preserve property of delinquent taxpayers from dissipation pending proceedings to recover that property. With respect I must dissent.

74 In the United States Court of Appeals for the Second
Circuit

Present: Hon. LEONARD P. MOORE, Hon. HENRY J. FRIENDLY,
Hon. PAUL R. HAYS, Circuit Judges

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

OMAR, S.A., LAZARD FRERES & CO., ET AL., DEFENDANTS

FIRST NATIONAL CITY BANK OF NEW YORK (FIRST NATIONAL
CITY BANK), DEFENDANT-APPELLANT

Judgment—June 26, 1963

Appeal from the United States District Court for the Southern
District of New York

This cause came on to be heard on the transcript of record
from the United States District Court for the Southern District
of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, ad-
judged, and decreed that the order of said District Court be
and it hereby is vacated in part and that the action be and it
hereby is remanded for a modification of the injunction in
accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk.

By VINCENT A. CARLIN,
Chief Deputy Clerk.

54

PETITION FOR REHEARING

75

[File endorsement omitted]

76

[File endorsement omitted]

77

In the United States Court of Appeals
for the Second Circuit

Docket No. 27980

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

FIRST NATIONAL CITY BANK, DEFENDANT-APPELLANT

and

OMAR, S. A., A URUGUAYAN CORPORATION; LAZARD FRERES &
CO.; LEHMAN BROTHERS; BELGIAN-AMERICAN BANKING
CORP.; BELGIAN-AMERICAN BANK AND TRUST CO.; AND FIRST
NATIONAL CITY TRUST CO., DEFENDANTS

*Petition for Rehearing by the United States of America and
Motion in The Alternative for a Stay of the Mandate—Filed
July 10, 1963*

To the honorable LEONARD P. MOORE, HENRY J. FRIENDLY,
and PAUL R. HAYS, United States Circuit Judges:

HONORABLE SIRS: The United States of America, appellee,
respectfully presents this petition, pursuant to Rule 25 of the
Rules of this Court, for a rehearing of the decision rendered
June 26, 1963, which vacated in part and remanded an in-
junction issued by the order of the Honorable Archie O.
Dawson, United States District Judge for the Southern
District of New York, which *inter alia* enjoined the
78 transfer of property or rights to property held by the
appellant, First National City Bank of New York
("Bank"), for the account of Omar, S. A. ("Omar"), a de-
linquent taxpayer.

The District Court grounded the issuance of the prelimi-
nary injunction on the fact that corporate income and
personal holding company taxes in excess of \$19,000,000
had been assessed against Omar. It further found an intent
on the part of Omar to liquidate, with transfers of substantial
assets abroad. The District Court concluded that there was

"a clear and present danger that plaintiff may be unable to recover upon defendant Omar's tax liability." (6a-7a) ¹

This petition requests rehearing of the decision of Judges Moore and Friendly, Judge Hays dissenting, which held that the preliminary injunction issued by the District Court was beyond its jurisdiction as to deposits held abroad in foreign branches of the Bank which "are collectible only outside the United States."

The grounds for this petition are that:

a. The present decision is based largely on the assumption that personal jurisdiction will not be obtained over Omar and on the further premise that the Bank, a single corporate entity, over which personal jurisdiction has been obtained, may not be enjoined from transferring Omar's property located outside the jurisdiction, without jurisdiction being obtained over Omar. The United States, which in this action seeks *inter alia* a judgment *in personam* against Omar, is taking necessary steps to effectuate personal jurisdiction over Omar. As Judge 79 Hays stated in the dissenting opinion, the injunction here involved is necessary to preserve property of a delinquent taxpayer from dissipation pending proceedings to recover such property.

b. The Court's conclusion is also based on the erroneous premise that a federal tax lien does not extend to property located outside the United States. This premise is in conflict with *United States v. Ross*, 302 F. 2d 831 (2d Cir. 1962).

c. The Court's determination that a taxpayer's deposits in foreign branches of a national bank which are payable, in the first instance, at the branches abroad do not constitute property or rights to property in the United States, is erroneous and in conflict with the previous decision of this Court in *First National City Bank v. Internal Revenue Service*, 271 F. 2d 616 (2d Cir. 1959), *certiorari denied* 361 U.S. 948, *rehearing denied* 362 U.S. 906; the decisions of the New York Court of Appeals in *Sokoloff v. National City Bank*, 239 N.Y. 158 (1924) and 250 N.Y. 69 (1928), and the well-reasoned opinion of Judge Irving Kaufman in *McGrath v. Agency of Chartered Bank*, 104 F. Supp. 964 (S.D. N.Y. 1952), *affirmed per curiam*, 201 F. 2d 368 (2d Cir. 1953).

¹ References with the suffix "a" refer to the Bank's appendix heretofore filed in this action.

d. The Court has given undue weight to the alleged "harmful consequences" to our national bank system abroad which might result from a decision recognizing the Government's right to reach bank deposits in a foreign branch of national bank to satisfy an outstanding tax liability. The present decision reveals a singular solicitude for the Bank's possible loss of the business of the "artful tax dodger."

Finally, rehearing is prayed in this case because the issues raised in the present decision have their greatest (if
80 not only) impact in this Circuit by virtue of New York's status as the center of international banking in this country. By the very nature of the present decision, the questions raised here may never again be presented to this Court, since no District Judge in this Circuit would issue an injunction such as the one issued by Judge Dawson. This Court, in the present decision, recognized that this case presented "an important question." Therefore, if the panel of this Court reaffirms its decision, the Government respectfully suggests that the matter be referred to the active Circuit Judges for determination *en banc*. Because of the apparent conflict with other decisions of this Circuit, the importance of the question here and the concentration of the problems involved in this Circuit, an *en banc* determination of this case is justifiable and appropriate.

ARGUMENT IN SUPPORT OF PETITION FOR REHEARING

The present decision is based on the Court's assumption that the District Court will never obtain personal jurisdiction over the taxpayer, Omar.² At this stage of the proceeding,
81 such conclusion is premature if not altogether erroneous.

The Government contended in the brief heretofore filed in this Court that there is every likelihood that personal jurisdiction over Omar can be effectuated by the service of process upon Omar's representatives who performed acts within this jurisdiction. Furthermore, even if this course of action not be possible, Omar may voluntarily appear in this action since the injunction of the District Court has successfully preserved several million dollars of assets belonging to Omar which are now held by the defendant, Lehman Brothers. (See Government Brief, p. 24, footnote 14.)

² A federal tax lien may be enforced against the taxpayer's property or rights to property without the necessity of obtaining personal jurisdiction

A. THE DISTRICT COURT HAS THE POWER TO ENJOIN THE BANK FROM DISSIPATING THE TAXPAYER'S ASSETS

As Judge Hays concluded, "there is no doubt" that the District Court, having *in personam* jurisdiction over the Bank, had the power to enjoin the Bank from dissipating the taxpayer's assets. The issue here is whether the Bank had the power to carry out the order of the District Court not to permit dissipation of deposits of the taxpayer in its foreign branches. The principle which controls this very question was decided by this Court in *First National City Bank v. Internal Revenue Service*, 271 F. 2d 616 (2d Cir. 1959), *certiorari denied*, 361 U.S.

948 (1960). See also *United States v. Ross*, 302 F. 2d 82 831 (2d Cir. 1962).³ The Bank is a single corporation.

Its "branches", foreign and domestic, are just that: branches. They are not separate entities in form or in fact. An order from the corporation's Board of Directors in New York will be or should be honored in a branch in Los Angeles or Montevideo or Paris. The District Court had the clear power to direct the New York corporation not to permit dissipation of assets in its possession and control.

The jurisdictional basis, then, for the injunction issued by the District Court was personal jurisdiction over the Bank. Certainly, at this stage of the proceeding, it is inconsequential whether the District Court has jurisdiction over a *res* or over the taxpayer. The injunction issued by the District Court

over the taxpayer. As we will demonstrate below, a tax lien has attached to Omar's deposits in the Bank, which is a single corporate entity having its head office in New York City. Omar's deposits constitute rights to property which were within the jurisdiction of the District Court. See *Sokoloff v. National City Bank*, 239 N.Y. 138 (1924); *First National City Bank v. Internal Revenue Service*, 271 F. 2d 616 (2nd Cir. 1959), *certiorari denied* 361 U.S. 948 (1960). It is only in the event that the Court concludes that the lien does not attach to such deposits that personal jurisdiction over Omar becomes relevant. In such event the Government should be afforded an opportunity to obtain personal jurisdiction over Omar and the injunction should stand pending such efforts.

³ In *United States v. Ross*, *supra*, at p. 834, one of the orders sustained by this Court was an injunction of the District Court ordering Ross, as the major stockholder and president of two corporations, to refrain from dealing with or transferring property of two corporations. The Court had not obtained jurisdiction over either corporation. The injunction was upheld on the ground that the Court had jurisdiction over Ross and could restrain him from acting "to frustrate the Court's powers by transferring corporate property."

which directed the Bank to hold the property of the taxpayer pending the outcome of the litigation was proper under the broad congressional grant of authority to the district courts embodied in Section 7402(a) of the Internal Revenue Code of 1954 (the "Code").⁴ The injunction of the District Court did not purport to establish or enforce any lien on any property or to direct the Bank to pay any sums to the United States or into Court.

83

B. A FEDERAL TAX LIEN ATTACHES TO PROPERTY
OUTSIDE THE UNITED STATES

However, even if the issues at bar are properly to be decided on the basis of whether a lien created under Section 6321 of the Code attaches to bank deposits of Omar in foreign branches of the Bank which are payable outside the United States, the Court was incorrect in concluding that the tax liens against Omar did not attach to such bank deposits. The Court's conclusion is based, first, on the proposition that a federal tax lien does not attach to property or rights to property outside the United States and, second, on the proposition (discussed in Part C, *infra*) that such bank deposits in foreign branches constitute rights to property outside the United States. We submit that the Court erred as to both of these very important propositions.

The determination that a federal tax lien does not attach to property or rights to property outside the United States conflicts with the decision of this Court in *United States v. Ross*, *supra*. In *Ross*, this Court held that the District Court had not exceeded its jurisdiction (1) in appointing a receiver under Section 7403(d) of the Code to enforce a tax lien over taxpayer's property, situate both within and without the United

⁴ Section 7402(a) of the Code provides:

"The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws."

The remaining relevant statutory provisions are set forth at footnote 4 of the opinion.

States, and (b) in directing the taxpayer to transfer to the receiver stock certificates of foreign corporations and other property having a situs outside the United States. It is true that in *Ross*, personal jurisdiction had been obtained over the taxpayer, but that is not a basis for distinction here since the remedy of the appointment of a receiver under Section 7403(d) is based on the existence of a lien on property to be enforced by such receiver, and not on the basis of personal jurisdiction over the taxpayer. The lien to be enforced and the remedies and procedures approved by this Court in *Ross* were, perforce, based upon the recognition that the lien attached to property located outside the United States.

This principle, of necessity, emanates from the fundamental nature of our Federal Internal Revenue Code. It is global in scope and levies a tax on income of United States citizens and residents from all sources, both foreign and domestic. See Section 61 of the Code. The provisions of the Internal Revenue Code relating to the enforcement of tax liens and Section 7402(a) authorizing injunctions in aid of revenue enforcement are part of and partake of the fundamental philosophy of our tax laws with respect to foreign corporations and foreign source income: United States corporations and residents are responsible under our tax laws for tax on their income from all sources, foreign corporations are subject to tax and therefore to United States jurisdiction on all fixed and determinable income from United States sources and on all income from United States business. The procedures for collecting tax by withholding from wages have similar global application. Certainly the Bank, as any domestic corporation, is required to withhold tax on wages earned by United States citizens employed in its foreign branches. See Sections 3401 and 3403 of the Code.

This is a Federal income tax case. The cases relied upon by the Court in concluding that a Federal tax lien does not extend to property located outside of the United States are not applicable here since they do not treat with the levy and collection of a Federal income tax. Since income, whether derived here or abroad, is subject to income tax, the remedies for the collection of tax on such income must of necessity pertain whether such remedies are sought to be applied with respect to property located here or abroad.⁵

⁵ The question of whether a foreign state will or will not permit a tax remedy to be enforced against property within such foreign state is irrel-

C. THE BANK DEPOSITS ARE WITHIN THE JURISDICTION OF THE DISTRICT COURT

However, even if we are to assume that the jurisdiction of the District Court depends upon a conclusion that the Bank has property or rights to property within the district, it is clear that under well-established principles, the Bank deposits and Omar's right to them are property within the Southern District. The Court's decision is based on the assumption that bank deposits in foreign branches of a national bank, which deposits are payable, in the first instance, at such foreign branches, are not property within the United States. The present decision fixes the situs of the debt arising from such deposits at the place of payment and this is a departure from the principle accepted by this Circuit that "the place of payment is not the criterion of a debt's situs." *McGrath v.*

Agency of Chartered Bank, 104 F. Supp. 964 (S.D. N.Y. 86 1952), *aff'd per curiam*, 201 F. 2d 368 (2d Cir. 1953).⁶

See also, *Chicago, Rock Island and Pacific Railway Co. v. Sturm*, 174 U.S. 710 (1899); *Blackstone v. Miller*, 188 U.S. 189, 205-206 (1903). What does control in determining whether a court has jurisdiction over a debt is whether the court has power over the person of the debtor. *McGrath v. Agency of Chartered Bank*, *supra*; *Blackstone v. Miller*, *supra*.

Since the main office of the Bank was located within the Southern District of New York, the District Court clearly had power over the person of the Bank. Four years ago, this Court, relying on section 25 of the Federal Reserve Act of 1913, 38 Stat. 271, 12 U.S.C. 601-604 held that a subpoena served upon the main office of a national bank could compel the pro-

evant here. See *United States v. Ross*, *supra*, 302 F. 2d at 834. The *Ross* case expressly holds that our courts may promulgate decrees against persons within the court's jurisdiction which decrees affect property and rights to property in a foreign state. However, our courts may not issue decrees which would require a person to act in violation of the laws of the foreign state. See, *In re Chase Manhattan Bank*, 297 F. 2d 611 (2d Cir. 1962); *United States v. Ross*, *supra*, 302 F. 2d at 834. It is this latter principle which prevents the infringement of the rights of foreign states in this area of intergovernmental relations. There is no suggestion here that the injunction violates the law of any foreign state.

⁶ In *McGrath v. Agency of Chartered Bank*, Judge Kaufman held that a debt payable only in Hamburg, Germany to persons residing in that city was property within the United States since the debtor resided in the United States.

duction of records held at a foreign branch. *First National City Bank v. Internal Revenue Service*, 271 F. 2d 616 (2d Cir. 1959). The Court's opinion was based on the proposition that the main office of a national bank, as well as all its branches, were part of one corporation, and the managers of all branches were subject to the control of the Board of Directors of the national bank' (271 F. 2d at 619).

It is also clear that the single entity of the national bank is ultimately responsible to make good the deposits in (and other debts of) its branches, both foreign and domestic. *Sokoloff v. National City Bank*, 239 N.Y. 138 (1924) and 250 N.Y. 87 (1928). In the *Sokoloff* cases, the New York Court of Appeals held that a depositor could bring an action in New York City (where the head office of the national bank was located) against a national bank where payment had been refused—or could not be made—at the foreign branch of the bank where the deposits were payable. The Court of Appeals concluded that the national bank, as a whole, became liable to the depositor at the time the deposits were made.

The two principles which clearly emerge then from *First National City Bank v. Internal Revenue Service*, *supra*, and *Sokoloff v. National City Bank*, *supra*, are (a) a district court sitting where the main office of a national bank is located has the power to compel the bank and any of its branches, foreign or domestic, to act or refrain from acting, and (b) the single entity of a national bank is responsible and liable for deposits made in the bank, whether such deposits are held at the main office or any of its branches. These two fundamental principles were entirely disregarded by the Court in the present decision.

The rules which were formulated in *First National City Bank v. Internal Revenue Service*, *supra*, and *Sokoloff v. National City Bank* are based on the grounds that (a) the main office and the branches of a national bank are part of a single corporate entity (not parent and subsidiary),⁸ and (b) the

⁷ It is, of course, the control over the *Board of Directors* at the head office of a national bank which gives a court sitting in the district in which the head office is located the power, under the *First National City Bank v. Internal Revenue Service* decision, to affect the activities of a foreign branch. A national bank is, of course, a creature of federal law. The existence of the bank and the conditions of its operations are determined under such law.

⁸ All national banks, including the appellant, are required to operate abroad by means of branches rather than foreign subsidiary corporations.

88 national bank maintains *one* capital account for its main office and branches, and while accounts of each foreign branch must be maintained separately from the main office and domestic branches, the national bank *must* at the end of each fiscal period transfer to its general ledger the profit or loss accrued at the branch for such period."

For certain purposes, branches of a national bank are sometimes treated as separate entities. This treatment of branches as separate entities is generally applicable in cases involving negotiable instruments. See, for example, *Chrzanowska v. Corn Exchange Bank*, 173 App. Div. 285, 159 N.Y.S. 385, *aff'd* 225 N.Y. 728 (1919), *Pan-American Bank & Trust Co. v. National City Bank*, 6 F. 2d 762 (2d Cir.) *cert. den.* 269 U.S.

554. However, the special treatment of branches of
89 national banks as separate entities for certain purposes should not obscure the fact that branches of a national

12 U.S.C. 601. As a single corporate entity, the bank is subject to federal income tax on the net income earned by the corporate entity as a whole—the main office and foreign and domestic branches. For an excellent discussion of some of the differences in tax consequences between operating abroad through branches of a single corporate entity and operating abroad through subsidiaries of a domestic parent corporation, see the opinion of this Court in *Associated Telephone and Telegraph Co. v. United States*, 306 F. 2d 824, 832-3 (2d Cir. 1962), *cert. den.*, 83 S.Ct. 504.

Section 25 of the Federal Reserve Act, 12 U.S.C. 41601-404, expressly provides that a national bank must keep the accounts of each foreign branch separate from its head office and other branches. The national bank must, at the end of each fiscal period, transfer to the general ledger of the entire bank the profit or loss accrued at each branch. The singularity of entity of a national bank from a fiscal standpoint is also illustrated by certain representations made by the appellant Bank in connection with a ruling request submitted by the Bank to the Commissioner of Internal Revenue relating to the treatment of currency devaluation "losses." A copy of the Bank's ruling request was annexed to the memorandum of law submitted below to Judge Dawson. Significant statements contained therein include the following:

"As of December 31, 1954, the statement of condition of the bank showed capital of \$200,000,000—Surplus of \$300,000,000—and Undivided Profits of \$52,662,613. These funds represent the equity of stockholders and are held for the protection of all depositors, both domestic and foreign." (Page 1)

"... each branch remits all its net income to the head office monthly, unless it is prohibited by law from so doing." (Page 2)

"A bank or any other corporation, of course, has only one actual capital account, representing the capital paid in by shareholders, and a foreign branch of a bank cannot have a capital separate from that of the bank itself." (Page 2)

bank are part of a single corporate entity. In the present decision, the Court heavily relies on certain New York cases, which appear to hold that a creditor of a depositor may not attach at the main office a deposit payable at a branch of the bank, for its conclusion that the deposits here which are payable, in the first instance, abroad are not property within the jurisdiction of the District Court.¹⁰ However, the New York cases which apparently prevent attachment of branch deposits at the main branch are based on the theory that attachment may not be utilized as a remedy other than at the place where the debt is then payable and do not stand for the proposition that there are no property rights at the main office. *McGrath v. Agency of Chartered Bank, supra, First National City Bank v. Internal Revenue Service, supra, and Sokoloff v. National City Bank, supra*, clearly establish that bank deposits in national banks, wherever such deposits are payable, are property within the jurisdiction of a district court sitting where the head office of the bank is located. The contract right of Omar which may be enforced at the head office in New York, subject to a condition precedent, constitutes a property right of Omar within the District Court's jurisdiction.

On the basis of the New York attachment cases, a question which may arise at the conclusion of this litigation is whether the United States will be required to demand payment of the deposits at the branch where such deposits are payable before a demand may be made at the head office. *United States v. Bowers Savings Bank*, 207 F. 2d 380 (2d Cir. 1961) is authority for the position that the condition precedent of a demand at the foreign branch is not a prerequisite for recovery of the deposits by the United States. See also *United States v. Bess*, 357 U.S. 51 (1958); Cf. *McGrath v. Cities Service Co.*, 189 F. 2d 744 (2d Cir. 1951), *aff'd*, 342 U.S. 330 (1952). However, if demand at the foreign branches is required before payment can be required of the main office,

¹⁰ Several of the New York cases relied upon in the present decision turn on an interpretation of 12 U.S.C. 604 which is in conflict with the interpretation of such section by this Court in *First National City Bank v. I.R.S.*, *supra*. See, e.g., *Bluebird Undergarment Corp. v. Gomez*, 139 Misc. 742, 240 N.Y.S. 319 (City Ct., N.Y. Cty. 1931) (slip opin. 2654-5); *Clinton Trust Co. v. Compania Azucarera Central Mabay S.A.*, 172 Misc. 148, 14 N.Y.S. 743 (Sup. Ct. N.Y. Cty.) *aff'd* 258 App. Div. 780 (1st Dept. 1939) (slip opin. 2655, 2656); *Cronan v. Schilling*, 100 N.Y.S. 2d 474, 476 (Sup. Ct., N.Y. Cty. 1960) (slip opin. 2656).

the Government can and would take all steps necessary to demand and receive payment at the foreign branches. The denial here of relief to the United States on the ground presumably that a demand for payment of the deposits may in the future be required to be made at the foreign branch is most premature. At this stage the Government does not even know at which foreign branches demands are to be made, assuming such demands are deemed essential. See dissenting opinion of Judge Hays. (slip opin. 2667).

D. THE POLICY CONSIDERATIONS RELIED ON IN THE PRESENT
DECISION

The result reached in the present decision was "in large part dictated" by "policy considerations having little to do with the collection of the revenue". In fact, the Court recognizes that by reason of its holding "Omar will be able to escape, at least partially, from a possible tax liability involving substantial sums". However, the result reached is justified by the Court on the ground that if the "artful tax dodger" does not
91 make his deposits at foreign branches of our national banks, this "would lead only to harmful consequences for our banking system abroad without any concomitant benefits here at home." (slip opin. 2662).

This reasoning of the Court, with its excessive concern for the "artful tax dodger", is highly questionable. It is undeniable that if we made certain of our institutions havens for tax dodgers and other unlawful elements, the business of these national institutions located here and abroad might, to some extent, increase. But the essence of our system of government is that our national institutions should not be utilized as havens for tax dodgers or as places of immunity for taxpayers who wish to evade their responsibilities to our Government. Presumably, national banks licensed by the United States have other advantages which would attract depositors and maintain United States institutions in an advantageous position over banks of local origin.

Finally, we submit that policy considerations concerning our banking system abroad primarily repose with the executive and legislative branches of our Government. If the executive branch has erred here in its policy determination, and if harm does result to our banking system abroad which outweighs the revenue considerations involved, Congress, acting on its own

initiative or at the request of the Executive, can amend the law after a comprehensive study of the problems involved.¹¹

92

E. CONCLUSION

We submit that Judge Hays was correct in stating that the present decision "is a wholly unwarranted limitation on the Government's power to preserve property of delinquent taxpayers from dissipation pending proceedings to recover that property." The present decision is also in conflict on essential points with prior decisions of this Court in *McGrath v. Agency of Chartered Bank*, *supra*; *First National City Bank v. I.R.S.*, *supra*; and *United States v. Ross*, *supra*.¹² Because New York City is the center in this country for international banking, the issues raised here are largely indigenous to this Circuit and it is here that the impact of the present decision will be the greatest.

If rehearing is granted, we would respectfully request the opportunity to submit a brief setting forth in detail the Government's position with respect to the issues raised in the present decision.

MOTION, IN THE ALTERNATIVE, FOR A STAY OF MANDATE

If the Court does not grant rehearing or if rehearing is granted and the present decision remains standing, we respectfully move this Court, under Title 28, U.S.C. 2101(f) and Rule 28(c) of the Rules of this Court, for an order
93 staying the mandate herein, pending the filing by the Government (if so authorized by the Solicitor General of the United States) of an application for a writ of certiorari.

¹¹ Congress has had occasion in recent years to consider legislation dealing with various complex questions concerning the taxation of American investments abroad; the utilization of foreign tax havens by American businesses; and the competitive position of foreign branches of national banks in relation to banks of local origin. See Revenue Act of 1962, § 12(a), 76 Stat. 1052; 26 U.S.C. 951, et seq., and 76 Stat. 388, 12 U.S.C. 604a.

¹² It is of some interest to note that the three prior decisions of this Court in conflict with the present decision were concurred in by three of the now active judges of the present Court, namely, Chief Judge Lumbard (*First National City Bank v. I.R.S.*); Judge Smith (*First National City Bank v. I.R.S.* and *United States v. Ross*) and Judge Hays (*United States v. Ross*). In addition, Judge Kaufman, then a District Judge, wrote the opinion in the *Agency of Chartered Bank* case which was affirmed *per curiam* by this Court.

to the United States Supreme Court and the final disposition therein of the case.

Respectfully submitted,

ROBERT M. MORGENTHAU,

*United States Attorney for the Southern District of
New York, Attorney for United States,*

and

ROBERT ARUM,

Assistant United States Attorney.

LOUIS F. OBERDORFER,

Assistant Attorney General.

HAROLD C. WILKENFELD,

Attorney, Department of Justice,

Washington 25, D.C.

Of Counsel

CERTIFICATE OF COUNSEL

I, ROBERT ARUM, Assistant United States Attorney in the office of Robert M. Morgenthau, United States Attorney for the Southern District of New York, counsel for the United States of America, do hereby certify that the foregoing petition for rehearing and motion, in the alternative, for a stay of mandate are presented in good faith and not for the purpose of delay.

Robert Arum

ROBERT ARUM

Dated: New York, New York, July 9, 1963

95 In the United States Court of Appeals
for the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the nineteenth day of September, one thousand nine hundred and sixty-three.

Present: Hon. J. EDWARD LUMBARD, Chief Judge, Hon. CHARLES E. CLARK, Hon. STERRY R. WATERMAN, Hon. LEONARD P. MOORE, Hon. HENRY J. FRIENDLY, Hon. J. JOSEPH SMITH, Hon. PAUL R. HAYS, Hon. THURGOOD MARSHALL, Circuit Judges.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

2 OMAR, S.A., LAZARD FRERES & CO., ET AL. DEFENDANTS

FIRST NATIONAL CITY BANK OF NEW YORK, (FIRST NATIONAL CITY BANK), DEFENDANT-APPELLANT

Order granting rehearing in banc—September 19, 1963

A petition for a rehearing in banc having been filed herein by counsel for the appellee.

Upon consideration thereof, it is

Ordered that said petition for rehearing in banc be and hereby is granted and that the Court will sit in banc to hear argument on Friday, October 18, 1963, at 10:30 A.M.

Further ordered that the parties shall exchange and file briefs on or before October 11, 1963.

A. DANIEL FUSARO,

Clerk.

In the United States Court of Appeals
for the Second Circuit

No. 196—September Term, 1963

Argued October 18, 1963

Docket No. 27980

UNITED STATES OF AMERICA, APPELLEE

v.

FIRST NATIONAL CITY BANK, APPELLANT

and

OMAR, S. A., a URUGUAYAN CORPORATION; LAZARD FRERES & Co.; LEHMAN BROTHERS; BELGIAN-AMERICAN BANKING CORP.; BELGIAN-AMERICAN BANK AND TRUST CO.; AND FIRST NATIONAL CITY TRUST CO., DEFENDANTS

Before LUMBARD, Chief Judge, CLARK, WATERMAN, MOORE, FRIENDLY, SMITH, HAYS and MARSHALL, Circuit Judges

98 *Louis F. Oberdorfer*, Assistant Attorney General, Department of Justice, Washington, D.C. (Harold C. Wilkenfeld, Michael A. Mulroney and Timothy B. Dyk, Attorneys, Department of Justice, Robert M. Morgenthau, United States Attorney for the Southern District of New York, Robert Arum and Stephen Charnas, Assistant United States Attorneys, on the brief), for appellee.

Henry Harfield, New York, N.Y. (Shearman & Sterling, Herman E. Compter and John E. Hoffman, Jr., New York, N.Y., on the brief), for appellant.

Milbank, Tweed, Hadley & McCloy, New York City (Roy C. Haberkern, Jr., and Isaac Shapiro, of counsel), for The Chase Manhattan Bank; Breed, Abbott & Morgan, New York City (Edward J. Ross, of counsel), for The First National Bank of Boston; Meyer, Kissel, Matz & Seward, New York City (Lester Kissel, of counsel), for Bank of America National Trust and Savings Association, as *amici curiae*.

*Opinion—Decided January 13, 1964***PER CURIAM:**

The court having sat *in banc* to hear the appeal, with the exception of Judge Kaufman who did not participate, and due deliberation having been had thereon, Judges Lumbard, Waterman, Moore, and Friendly vote to reverse the order of the district court for the reasons set forth in Judge Moore's opinion reported at 321 F. 2d 14, and Judges Smith, Hays, and 99 Marshall vote to affirm for the reasons set forth in Judge Hays' opinion reported at 321 F. 2d 25.¹ The order of the district court, reported at 210 F. Supp. 773 (1962), is accordingly reversed.

Upon application therefor, the court will grant a stay, pursuant to Rule 28(c), pending application for certiorari to the Supreme Court of the United States.

100 In the United States Court of Appeals
 for the
 Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court-house in the City of New York, on the thirteenth day of January one thousand nine hundred and sixty-four.

Present: Hon. J. EDWARD LUMBARD, Chief Judge,
 Hon. STERRY R. WATERMAN,
 Hon. LEONARD P. MOORE,
 Hon. HENRY J. FRIENDLY,
 Hon. J. JOSEPH SMITH,
 Hon. PAUL R. HAYS,
 Hon. THURGOOD MARSHALL, Circuit Judges

¹ Prior to his death Judge Clark had indicated his intention to vote for affirmance.

No. 196

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

OMAR, S.A., LAZARD FRERES & CO., ET AL., DEFENDANTS
FIRST NATIONAL CITY BANK OF NEW YORK
(FIRST NATIONAL CITY BANK), DEFENDANT-APPELLANT

Judgment—January 13, 1964

Appeal from the United States District Court for the Southern
District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed.

Further ordered that the judgment of this Court of June 26, 1963 be and it hereby is vacated.

A. DANIEL FUSARO,

Clerk.

101 [File endorsement omitted]

102 [Clerk's certificate to foregoing transcript omitted in printing.]

103 Supreme Court of the United States

October Term, 1963

No. 998

UNITED STATES, PETITIONER

vs.

FIRST NATIONAL CITY BANK

Order allowing certiorari—Filed June 1, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

FIRST NATIONAL CITY BANK

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT**

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in the above-entitled case.

OPINIONS BELOW

The opinion of the district court (R. 6a-10a) is reported at 210 F. Supp. 951. The opinion of the panel of the court of appeals (Appendix A, *infra*, pp. 21-44) is reported at 321 F. 2d 14. The opinion of the court of appeals, sitting *en banc* (Appendix B, *infra*, pp. 45-46), is not reported.

(1)

JURISDICTION

The judgment of the court of appeals, sitting *en banc*, was entered on January 13, 1964 (Appendix C, *infra*, pp. 47-48). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether, prior to service of process on the taxpayer in an action to collect taxes, the district court has the power to issue an injunction *pendente lite* prohibiting third parties within the jurisdiction from disposing of the taxpayer's property even though the property may be located outside the jurisdiction.

2. Whether a bank deposit in a foreign branch of a New York bank, collectible in New York if payment is refused at the branch, is subject to tax lien foreclosure in the district of the home office.

STATUTES INVOLVED

Sections 6321, 7402(a) and 7403(a) of the Internal Revenue Code of 1954 and Section 1655 of 28 U.S.C. are set forth in Appendix D, *infra*, pp. 49-51.

STATEMENT

Omar, S.A., is a Uruguayan corporation. (R. 11a). On October 31, 1962, the Commissioner of Internal Revenue made jeopardy assessments against Omar, totalling approximately \$19,300,000. These assessments were on account of personal holding company tax liabilities found to have been incurred but unpaid with respect to income realized by Omar from sources within the United States, during its fiscal years

March 31, 1955, through March 31, 1961.¹ (R. 12a-14a.) On the same day, the First National City Bank (respondent), was served with notice of levy and notice of the federal tax lien (R. 31a).

Concurrently, the United States commenced an action in the United States District Court for the Southern District of New York naming, as defendants, Omar, S.A., Lazard Freres & Co., Lehman Brothers, Belgian-American Banking Corp., Belgian-American Bank & Trust Co., First National City Bank (respondent in this case), and First National City Trust Co. (R. 11a.) The complaint alleged, *inter alia*, that respondent had "substantial sums of money for, for the account of, or for the credit of, Omar * * *." (R. 15a-16a.) Personal jurisdiction over respondent was acquired by service of process (R. 8a) but Omar has not yet been served.

The complaint requested that the district court determine that Omar was indebted to the United States for taxes, interest and penalties in the amount of the assessment; that the court foreclose the tax lien of the United States upon all of Omar's property and rights to property, including sums held for the account or credit of Omar in foreign branch offices of the defendant-banks; and that it grant such "further relief that it deems is just, equitable and proper."

¹ Omar failed to pay these assessments. (R. 6a-7a, 12a-14a, 16a.) On May 20, 1963, Omar petitioned the Tax Court for a redetermination of these deficiencies. Docket No. 2041-63. No decision has been rendered in that proceeding. Since a jeopardy assessment is involved here, collection is authorized despite the pendency of Tax Court proceedings. See Section 6213(a), Internal Revenue Code of 1954.

The complaint also requested that, pending the determination of the action, the court enjoin the defendants from transferring any property or rights to property held for the account of Omar. (R. 15a-17a.)

Affidavits by several internal revenue agents were filed in support of the application for injunctive relief showing the following facts (R. 22a-30a): The possible existence of a tax delinquency first came to the attention of the Internal Revenue Service in 1959, when Omar filed its first and only tax return. (R. 25a-26a.) Because the return was incomplete, additional information about the corporation was requested. This information was not supplied. (R. 22a-25a.)

Thereafter, the internal revenue agent conducting the examination informed Omar that he proposed to make a determination of Omar's tax liability on the basis of information at hand. (R. 23a.) The Internal Revenue Service later learned that in June 1961, a director of Omar came to the United States and commenced to liquidate Omar's assets in the United States. (R. 23a.) The records of Lehman Brothers, a brokerage house of which Omar was a customer, disclose that in December 1961, Omar withdrew \$500,000 from its account there. A notation opposite the withdrawal states: "Check to 1st National City Bank." (R. 29a.) The records of Lazard Freres & Company, another brokerage house which held securities for Omar, reveal that in the same month \$1,640,000 was paid to Omar with the notation: "Transfer by wire to 1st National City Bank of

n y [sic] Montevideo credit for your acct." (R. 27a.) In the same year \$400,000 was transferred from Omar's Lazard Freres account to the Montevideo branch of the Belgian-American Banking Corporation (another of the original defendants) for the account of Omar (R. 27a), and \$800,000 was transferred from Omar's account with Abraham & Company, another New York brokerage house, to the same Montevideo account. (R. 28a.) There was other evidence that Omar was removing its assets from the United States. (R. 23a-30a.)

On October 31, 1962, the district court issued a temporary restraining order (R. 6a) and, after a hearing, filed an opinion (R. 6a-10a) which found in part (R. 7a):

The affidavits of the plaintiff show an intent to liquidate, and in fact, substantial liquidations of the defendant Omar's accounts within the United States and transfer of the proceeds outside of the territorial jurisdiction have occurred. It therefore appears that there is a clear and present danger that plaintiff may be unable to recover upon defendant Omar's tax liability.

Accordingly, on the basis of its "personal jurisdiction over the officers of the bank within the United States" (R. 8a-9a), the district court concluded it should exercise its "equitable power to issue a preliminary injunction so as to prevent irreparable injury pending

the determination of an action." (R. 7a-8a).² It thereupon ordered (R. 5a):

that pending the determination of this action or until further order of this Court, the defendants, * * * First National City Bank of New York * * * be and they are hereby restrained from * * * disposing of * * * any property or rights to property of Omar, S.A., * * * now held for or for the account of the said Omar, S.A., by them or by any of their branches, agents, or nominees whether located within the United States or not and whether their branches, agents, or nominees are located within the United States or not.

" The court's opinion observed that if compliance with the injunction were shown to violate foreign law, the injunction would be modified (R. 8a-9a).

² Subsequently, on a satisfactory showing by Belgian-American Banking Corporation and Belgian-American Bank and Trust Co. that they had no accounts or other property of Omar in the United States or abroad, the complaint was dismissed as to them with the consent of the United States. On prior similar showings by defendants Belgian-American Bank and Trust Co. and First National City Trust Co., they were not included in the order for the preliminary injunction. (R. 9a.) Respondent, in opposing the motion for a preliminary injunction, filed an affidavit by one of its vice-presidents which affirmatively stated that Omar was not a depositor of the bank at its head office or any domestic branch, but which neither affirmed nor denied that Omar was a depositor at any of the bank's foreign branches. (R. 31a-32a.) The location and other details of Omar's foreign branch accounts, if they exist, now await further clarification in the district court, pending disposition by this Court of this petition for certiorari.

Respondent appealed from the issuance of the preliminary injunction. (R. 33a-34a.) A three-judge panel of the court of appeals reversed the district court, Judge Hays dissenting. (Appendix A, *infra*, pp. 21-44.) The majority reasoned that since the district court did not yet have personal jurisdiction over Omar, it could proceed only with reference to such of Omar's property as was located within its jurisdiction. The court concluded that deposits held by respondent which were "collectible [by Omar] only outside the United States" (R. 53a) were not property within the jurisdiction of the district court. This followed, said the court, because the rights of the United States, by virtue of its tax lien, were no greater than Omar's rights, and Omar could not have brought suit in New York to collect deposits payable abroad unless it had demanded and been refused payment at the counters of the foreign branch. On rehearing *en banc* the court of appeals again reversed the district court by a vote of 4-to-3.³

REASONS FOR GRANTING THE WRIT

1. The decision of the court of appeals in this case severely hampers the Internal Revenue Service in its expanding efforts to collect delinquent taxes from nonresident aliens and American citizens residing abroad. Such persons not infrequently frustrate col-

³ Judge Kaufman did not participate in the rehearing. Judge Clark died after argument but before announcement of the decision. It was noted that he had indicated his intention to vote for affirmance of the district court. An equal division would have resulted in affirmance. *Farrand Optical Co. v. United States*, 317 F. 2d 875, 885-886, (C.A. 2).

lection of the taxes which they have incurred by liquidating their American assets and transferring the proceeds to foreign branches of United States banks, brokerage houses, and other financial institutions. As soon as a taxpayer has ordered the transfer, the proceeds, by contract, become payable at the counters of the foreign branch. The United States seeks the power to freeze such funds before they are paid to the taxpayers abroad. The decision below effectively bars this remedy within the Second Circuit, which includes the Nation's principal financial center. The court holds that all funds which by contract are payable abroad are beyond the jurisdiction of the district court and thus cannot support an action *quasi in rem* to foreclose a federal tax lien.⁴ And it rules additionally that the United States is not entitled to an injunction barring the transfer of funds located beyond the jurisdiction of the district court prior to service of process upon the delinquent taxpayer, even though the assets are likely to be dissipated during the time it takes for the United States to serve process and to establish the validity of that service in litigation.

The court of appeals' opinion creates evident temptations and possibilities for evasion. It is anticipated that in the near future the decision will assume even greater significance. The Internal Revenue Service has recently embarked upon an expanded audit program of all international tax matters within its juris-

⁴ In dictum the court of appeals also stated that such property is not subject to levy. (Appendix A, *infra*, pp. 37-38.)

diction. Statutory authority has been granted which will make it possible to secure detailed information returns concerning certain foreign corporations.⁵ As a consequence, it is predictable that large additional unpaid tax liabilities will be discovered and that in many instances the assets necessary to satisfy these liabilities will have been transferred from the United States to (and will be payable at) foreign branches of United States financial institutions. The amount of these liabilities should be substantial. The present case alone involves more than \$19,000,000, of which some \$2,140,000 may be on deposit in respondents' foreign branches.

The preliminary injunction granted by the district court would simply maintain the *status quo* by barring the transfer of those funds which are payable at foreign branches of the respondent and are held for the account of Omar. Its purpose is to preserve them to satisfy any judgment, whether personal or *quasi in rem*, which may be entered against Omar at the conclusion of this action. By the same token, if the preliminary injunction is dissolved, satisfaction of the judgment from these funds will prove difficult if not impossible.

2: In this proceeding, the United States may be able to secure a judgment against Omar either by obtaining personal jurisdiction over that corpora-

⁵ Section 6046 of the Internal Revenue Code of 1954, as amended by Section 20(b) of the Revenue Act of 1962, P.L. 87-834, 76 Stat. 960. See Fox, *Reporting Requirements on Foreign Activity Under the Revenue Act of 1962*, 42 Taxes 215 (April 1964).

tion* or by foreclosing its lien upon Omar's property within the district. Personal jurisdiction over Omar may be secured by service of process under Section 302(a) of the New York Civil Practice Law and Rules, 7B McKinney's Consolidated Laws of New York Annotated, which confers personal jurisdiction over a corporation "as to a cause of action arising from" the transaction of business within New York.⁷ Alternatively, jurisdiction will be secured if Omar makes a general appearance in the action to defend on the merits in order to protect property over which the district court concededly has jurisdiction.⁸ The court of appeals seems to have assumed that an injunction barring a transfer of all of the taxpayer's property would have been proper once personal jurisdiction was established. It did not, however, explain

* Omar could then be ordered to transfer the funds on deposit to the United States. See *United States v. Ross*, 302 F. 2d 831 (C.A. 2d). If it refused to comply, the court could then act under Rule 70 of the Federal Rules of Civil Procedure and cause the transfer to be made by a court officer. Furthermore, for purposes of lien foreclosure, the situs of the debt may be irrelevant if the court has personal jurisdiction over both the principal defendant and his debtor. See, e.g., *Schlaefel v. Schlaefel*, 112 F. 2d 177 (C.A.D.C.)

⁷ It is true that Section 302(a) did not become effective until September 1, 1963. However, the United States was entitled to argue (see *Helvering v. Gowran*, 302 U.S. 238, 245) and did argue, this ground in support of the district court's decision. Section 302(a), modeled upon the Illinois counterpart, is held to apply to transactions occurring before its effective date. *Stede v. DeLeeuw*, 40 Misc. 2d 807, 244 N.Y.S. 2d 97 (S.C. Nassau Co.). See also *Nelson v. Miller*, 11 Ill. 2d 378, 143 N.E. 2d 673.

⁸ There is a conflict of authority as to whether a defendant in Omar's position may enter a special appearance and defend

why such relief was inappropriate pending an effort to secure and perfect personal jurisdiction.

The United States, we submit, is entitled to a preliminary injunction during its efforts to secure personal jurisdiction over the taxpayer. Such an injunction is patently "necessary or appropriate for the enforcement of the internal revenue laws" within the meaning of Section 7402(a) of the Internal Revenue Code of 1954. In comparable situations the power of a district court to act has always been recognized. Thus, an injunction may be issued to preserve the *status quo* pending litigation of the issue of jurisdiction, *United States v. United Mine Workers*, 330 U.S. 258, 290. A district court may transfer an action to another district before the defendant in the action has been served with process. *Goldlawr, Inc. v. Heiman*, 369 U.S. 463. The provisional remedies provided by Rule 64 of the Federal Rules of Civil Procedure, including attachment and garnishment, become available upon the commencement of the action by the filing of the complaint even though the defendant has not been served with process.⁹ A court of equity may entertain an independent action to prevent the dissipation of property pending the institution of an action at law to try title to the property. *Horsburg v. Baker*, 1 Pet. 232,

on the merits as to the property over which the court has jurisdiction without submitting itself to the personal jurisdiction of the court. See generally 2 Moore, *Federal Practice*, Par. 12.13. It should be noted that Omar is now litigating the validity of the assessment in the Tax Court.

⁹ *Jacobson v. Coon*, 165 F. 2d 565 (C.A. 6th); *Marine Transport Lines, Inc. v. Nunez*, 211 F. Supp. 156 (N.D. Cal.)

236; *Georgia v. Brailsford*, 2 Dall. 402, 415.¹⁰ The order sought in this case, we believe, is of the same nature.

Nor is such an order unfair to respondent in any respect. It would merely prevent respondent, which is concededly present within the jurisdiction of the court, from facilitating the dissipation of the taxpayer's assets in foreign countries. And the district court's retained power to amend the terms of the order and its expressed readiness to modify its provisions if it is demonstrated that they compel respondent to violate foreign law (p. 6, *supra*) afford respondent full protection.

3. We submit that the district court's power under Section 7402(a) of the Internal Revenue Code to enter a protective injunction while the government seeks to obtain personal service on Omar is sufficient ground to sustain the district court's order at this time without considering the issue treated by the court of appeals—*i.e.*, whether Omar's deposits in respondent's foreign branches, which are collectible in the first instance only abroad, may be the subject of a tax lien foreclosure action in New York. This latter question would become material to the issuance of the preliminary injunction only if personal jurisdiction over Omar could not be obtained. Nonetheless, if

(dictum); *Hearst v. Hearst*, 15 F.R.D. 258 (N.D. Cal.); *Reiber v. Trailmobile Co.*, 11 F.R.D. 431 (S.D. Mo.). But see *Interstate Cigar Co. v. Corral Wodiska y CA*, 30 F.R.D. 354 (E.D. N.Y.)

¹⁰ See also *LaChapelle v. Bubb*, 69 Fed. 481 (E.D. Wash.); *Thomas v. Nantahala Marble & Talc Co.*, 58 Fed. 485 (C.A.

the question were ripe, we would urge that the court of appeals erroneously held that the United States could not enforce a tax lien against such a deposit.

Section 6321 of the Internal Revenue Code of 1954 imposes a tax lien upon "all property and rights to property" of a delinquent taxpayer. Section 7403(a) provides that an action may be brought to foreclose this lien "or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of" the tax. It is established that the government's tax lien, at the least, extends to all property of the taxpayer which is located within the United States. An action to foreclose a federal tax lien may be brought wherever the property is located. 28 U.S.C., Section 1655.¹¹ And the situs of a debt, under this Court's decision in *Harris v. Balk*, 198 U.S. 215, is wherever the debtor can be found. "Power over the person of the garnishee confers jurisdiction * * * [over the debt]." *Id.* at 222.¹²

4th); *Santee River Cypress Lumber Co. v. James*, 50 Fed. 360 (C.C. S.C.); *Lanier v. Alison*, 31 Fed. 100 (C.C. S.D. Ga.); *United States v. Parrott*, Fed. Cas. No. 15,988, 27 Fed. Cas. 416, 422-423 (CC. N.D. Cal.) (dictum).

¹¹ Section 1655 "provides an exemption from the general venue statute * * *." Hart and Wechsler, *The Federal Courts and the Federal System*, pp. 954-955; *Greeley v. Lowe*, 155 U.S. 580.

¹² It is true that in *Harris v. Balk*, *supra*, this Court did state that garnishment is only available if the garnishee's creditor could sue to collect the debt within the jurisdiction. However, this limitation is not relevant to the situs of the debt, but rather to the common-law rule that the garnishor

However, the court of appeals appears to have held that the United States' tax lien extends only to debts which the taxpayer could, at the time the lien attaches, collect by suit within the district. Since, under New York law (*Sokoloff v. National City Bank*, 239 N.Y. 158, 145 N.E. 917), Omar could sue in New York to collect deposits which are payable abroad only after demanding, and being refused, payment without the country, the court concluded that the United States did not have a tax lien upon those deposits which

acquires no greater rights than the garnishee's creditor had. See *id.* at 226. Furthermore, it has not generally been interpreted to bar garnishment of a debt which is payable by contract at a place without the jurisdiction. Cases applying this rule are *Schlaefel v. Schlaefel*, 112 F. 2d 177, 182-183 (C.A.D.C., 1940) (dictum); *The Copperfield*, 7 F. 2d 499 (S.D. Ala., 1925), affirmed, 26 F. 2d 175 (C.A. 5th), certiorari denied, 278 U.S. 623; *Konstantinidis v. S.S. Tarnus*, 196 F. Supp. 433 (E.D.N.Y., 1961) (semble); *Pierce v. Pierce*, 153 Ore. 248, 56 P. 2d 336 (1936); *Morrison v. Illinois Central R. Co.*, 101 Neb. 49, 161 N.W. 1032 (1917); *Leech v. Brown*, 172 Iowa 182, 154 N.W. 440 (1915); *Shuttleworth & Co. v. Marx & Co.*, 159 Ala. 418, 49 So. 83 (1909); *Steer v. Dow*, 75 N.H. 95, 71 A. 217 (1908); *Harvey v. Thompson*, 128 Ga. 147, 57 S.E. 104 (1907); *Baltimore & O. R. Co. v. Allen*, 58 W. Va. 388, 52 S.E. 465 (1905); see also *Nichols v. Hooper*, 61 Vt. 295, 17 A. 134 (1889); *Tootle v. Coleman*, 107 Fed. 41 (C.A. 8th, 1901), certiorari denied 183 U.S. 695; *Cross v. Brown*, 19 R.I. 220, 33 A. 147 (1895) affirmed *sub nom. King v. Cross*, 175 U.S. 396; *Fisher v. Consequa*, Fed. Cas. No. 4816, 9 Fed. Cas. 120 (C.C. Pa. 1809) (semble); *Sturtevant v. Robinson*, 35 Mass. 175 (1836).

could be foreclosed in this action.¹³ But as this Court held in *United States v. Bess*, 357 U.S. 51, the government's tax lien extends to all interests in property which, under State law, the taxpayer could himself secure. *Bess* does not intimate that the taxpayer must be able to reach this interest by suit rather than by some other method. And the lower federal courts, albeit with some exceptions, hold that the government's tax lien extends directly to property interests of the taxpayer which the taxpayer himself could

¹³ The court of appeals also seems to have placed some reliance upon the holding of some New York cases that the home office of the bank and its branches are separate entities. It is obvious, however, that the respondent is a single entity, composed of both a home office and branches, which is indebted to the taxpayer. See 12 U.S.C. 601 and 604. Furthermore, the capacity of the respondent to sue and be sued is governed by federal law (Federal Rules of Civil Procedure, Rule 17(b)), and the statute under which the respondent is organized confers the power "To sue and be sued" upon the corporation as a whole, not separately upon the home office and the branches. 12 U.S.C. 24. Consequently the district court has jurisdiction over the entire corporation. See *National Bank v. Republic of China*, 348 U.S. 356 (allowing set-off for securities located at foreign branch against debt owing at the home office); *First National City Bank v. Internal Revenue Service*, 271 F. 2d 616 (C.A. 2d), certiorari denied, 361 U.S. 948; see also *Domenech v. National City Bank*, 294 U.S. 199, 204; *United States v. Hopkins*, 193 F. Supp. 207, 210 (S.D.N.Y.).

The court of appeals in the present case recognized that respondent's home office and branches were part of a single entity in holding that the United States in this action may reach foreign branch deposits which are payable in New York.

secure by suit only by first making a demand upon his debtor or by surrendering an instrument.¹⁴

The sharp difference in approach is illustrated by the decision of the Fourth Circuit in *United States v.*

¹⁴ Thus, the United States is entitled to foreclose a lien on bank deposits even though the taxpayer could not reach them without surrendering the passbook. See *United States v. Bowers Savings Bank*, 297 F. 2d 380 (C.A. 2d); *United States v. Manufacturers Trust Co.*, 198 F. 2d 366 (C.A. 2d); *United States v. Emigrant Industrial Sav. Bank*, 122 F. Supp. 547 (S.D. N.Y.) (dictum). See also *United States v. Buia*, 144 F. Supp. 477 (S.D. N.Y.).

It can foreclose a lien upon the cash surrender value of life insurance policies even though the taxpayer could not reach that interest without formally electing to do so and surrendering the policy. *United States v. Ball* (C.A. 4th), decided January 7, 1964 (64-1 U.S.T.C., par. 9191); *United States v. Metropolitan Life Insurance Co.*, 256 F. 2d 17 (C.A. 4th); *United States v. Salerno*, 222 F. Supp. 664 (Nev.) (semble); *United States v. Brody*, 213 F. Supp. 905 (Mass.), now pending on appeal (C.A. 1st); *United States v. Bankers' National Life Insurance Co.*, 198 F. Supp. 727 (N.J.), now pending on appeal (C.A. 3d); *United States v. Wilson*, 195 F. Supp. 332 (N.J.) (semble), affirmed on another ground, 304 F. 2d 530 (C.A. 3d); *United States v. Hopkins*, 193 F. Supp. 207 (S.D. N.Y.); *United States v. Bosk*, 180 F. Supp. 869 (S.D. Fla.) (semble). But see *United States v. Metropolitan Life Insurance Co.*, 130 F. 2d 149 (C.A. 2d); *United States v. Mitchell*, 210 F. Supp. 810 (S.D. Ala.), now pending on appeal (C.A. 5th) (semble). See also *United States v. Penn Mutual Life Insurance Co.*, 130 F. 2d 495 (C.A. 3d); *United States v. Massachusetts Mutual Life Insurance Co.*, 127 F. 2d 880 (C.A. 1st) (both denying levy penalty but possibly implying that lien foreclosure is available).

It can foreclose a lien upon a debt represented by a negotiable instrument, even though the taxpayer could not collect without surrendering the instrument. See *United States v. Schuermann*, 106 F. Supp. 86 (E.D. Mo.); see also *United States v. Caldwell*, 74 F. Supp. 114 (M.D. Tenn.).

Metropolitan Life Insurance Co., 256 F. 2d 17. In *Metropolitan Life*, the United States sought to reach the cash surrender value of life insurance policies of a taxpayer-insured who had fled the United States. It was held that the United States had a tax lien upon the cash surrender value of the policies which it was entitled to foreclose by suit in the district in which the insurance company was doing business even though the taxpayer-insured could not collect from the company without first electing to receive the cash surrender value and surrendering the policies. The court reasoned (pp. 24-25):

* * * the surrender is for the protection of the companies and they will be as well protected by the judgment of the court as by the surrender of the policies, since the policies are not negotiable. * * * *Harris v. Balk*, supra. Of course, surrender of the policies should be ordered if the policies are available for surrender. When, however, they are unavailable for surrender, because the owner has absconded to a foreign country and is beyond the reach of personal process, and when the interest of the insurer will be protected by the judgment of the court, the insurer should be required to pay the cash surrender value in the proceeding under the statute. * * * we "see no reason to uphold a taxpayer who admits he has an interest in property but flauntingly says it is beyond the reach of the Government." To which we may add that the court is not so impotent that it cannot apply to the satisfaction of tax liens property interests of a taxpayer held by corporations within its jurisdiction.

The anomaly of the decision below is apparent when it is considered that Omar's deposits in respondent's foreign branches, even if not contractually collectible in New York, are as a practical matter probably collectible at any branch designated by Omar for payment. It is therefore unrealistic to consider the right of the respondent bank to insist upon payment abroad as being of any practical significance. The policy of the cases such as *Metropolitan Life* requires that these funds not be placed beyond the reach of a tax lien.

Although respondent has argued that it would not be protected by a *quasi in rem* judgment in this case because Omar might bring suit in a foreign court and collect its deposits, this possibility appears remote.¹⁵ Assuming that the foreign tribunal might refuse comity to a United States judgment, respondent might be held entitled to reimbursement from the United States. Cf. *Cities Service Co. v. McGrath*, 342 U.S. 330. In any event, at this stage of the litigation the existence of actual or potential liability has not been established.

Nor do considerations of policy require exemption of deposits in foreign branches of United States banks from judgments *quasi in rem* foreclosing federal tax liens upon deposits transferred from the United

¹⁵ "[J]udgments, not strictly *in rem*, under which a person has been compelled to pay money, are so far conclusive that the justice of payment cannot be impeached in another country, so as to compel him to pay again. * * * a judgment in foreign attachment is conclusive, as between the parties, of the right to the property or money attached." *Hilton v. Guyot*, 159 U.S. 113, 168. A judgment *in rem* is entitled to comity even if it is based upon a revenue claim. *Banco Nacional de Cuba v. Sabbatino*, No. 16, this Term, slip. op., pp. 14-15.

States and made payable at the branch. The Treasury Department plans to limit the institution of these enforcement suits to those cases in which the Internal Revenue Service has reason to believe that a taxpayer beyond the jurisdiction of the United States courts has been transferring funds out of the country to a foreign office in order to hinder or delay tax collection.¹⁶ The maintenance of such actions cannot fairly be described as impairing the attractiveness of foreign branches of United States banks to their normal customers.¹⁷

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted.

ARCHIBALD COX,
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Attorney.

APRIL, 1964

¹⁶ The Treasury Department also proposes to limit the authority to levy to such a situation.

¹⁷ As indicated at the outset of point 3, we do not believe that the second issue need be reached in the present posture of the litigation, although it was in fact decided by the court of appeals.

A somewhat factually similar case is now pending on appeal in the Fifth Circuit, No. 19,990, *Johannson v. United States*. However, in that case, though the funds were payable at a foreign bank, the taxpayer has been served with process.

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 307—September Term, 1962

(Argued April 11, 1963 Decided June 26, 1963)

Docket No. 27980

UNITED STATES OF AMERICA, APPELLEE

v.

FIRST NATIONAL CITY BANK, APPELLANT

and

OMAR, S.A., a Uruguayan corporation; LAZARD FRERES
& Co.; LEHMAN BROTHERS; BELGIAN-AMERICAN
BANKING CORP.; BELGIAN-AMERICAN BANK AND
TRUST Co.; and FIRST NATIONAL CITY TRUST Co.,
DEFENDANTS

Before: MOORE, FRIENDLY and HAYS, *Circuit Judges*.

Appeal from an injunction issued by the United States District Court for the Southern District of New York, Archie O. Dawson, Judge, enjoining the transfer of funds held by the defendant's branch bank abroad for the account of an alleged delinquent taxpayer.

Vacated in part and remanded.

MOORE, Circuit Judge:

This appeal presents an important question concerning the scope of an injunction against an American bank affecting deposits that may be held for the credit of an alleged delinquent taxpayer in a branch bank outside of the United States.

The taxpayer involved is Omar, S.A., a Uruguayan corporation. An investigation into Omar's affairs in this country revealed the likelihood that Omar was indebted to the United States for unpaid taxes and that sometime in June, 1961, Omar commenced a program of liquidating its holdings of securities in this country and transferring the receipts to Uruguay.¹ On October 31, 1962, the Internal Revenue Commissioner caused the issuance of jeopardy assessments against the taxpayer for deficiencies in corporate income tax totalling about \$19,300,000 for the fiscal years March 31, 1955, through 1961, inclusive. Notice of the assessment and demand for payment was sent to Omar.

On the same day the United States filed a complaint in the District Court for the Southern District of New York naming as defendants Omar, S.A.; two banks, The First National City Bank of New York

¹ An affidavit submitted by John H. Walker, an employee of the Office of International Operations, Internal Revenue Service, states that an investigation of the records of Lazard Freres & Co. revealed that on June 23, 1961, Omar was paid \$400,000 with the notation, "Pd Belgian American Banking Corp. a/c Banco Italo Belge Montevideo for your account" and on December 8, 1961, \$1,640,000 was paid to Omar with the notation, "Transfer by wire to 1st National City Bank of ny (sic) Montevideo credit for your account." An affidavit submitted by Forrest J. Kern of the same office reveals a withdrawal from Omar's account with Lehman Brothers of \$500,000 with the notation "check to 1st National City Bank."

and Belgian-American Banking Corp.; two brokerage houses, Lazard Freres & Co. and Lehman Bros.; and two trust companies, First National City Trust Co. and Belgian-American Bank & Trust Co. The complaint alleged that defendants, other than Omar, held sums for the account of or to the credit of Omar and prayed that the District Court adjudge Omar indebted to the government for unpaid taxes; find a valid lien existing in favor of the plaintiff on all property or rights to property belonging to the defendant Omar; enjoin the other defendants from in any way transferring or disposing of such property; order the return of all such property to the jurisdiction of the court; and order the foreclosure of plaintiff's lien on any such property held by defendants and its judicial sale. No personal jurisdiction has been obtained over the taxpayer Omar. An application for a temporary restraining order was granted on October 31, 1962, and on November 20, 1962, the district court, after hearing both sides, granted a preliminary injunction enjoining certain defendants from transferring or disposing of any property or rights to property, whether or not located within the United States, held for the account of Omar by defendants, their branches, agents or nominees.²

Defendant First National City Bank of New York [hereinafter referred to as "Citibank"] appeals from so much of the order as applies to property or rights to property that it may hold in branch banks outside

² The defendants Belgian-American Banking Corp. and First National City Trust Co. filed uncontroverted affidavits alleging that they held no property or rights to property belonging to the taxpayer. Therefore, they were excluded from the order issued by the court.

the United States.³ Citibank's argument on appeal is that under New York law, a deposit in its branch bank would not be collectible by Omar in New York, Omar's sole right being against any branch bank in which such deposits have been made; that there being no debt in the United States, there is no property or right to property to which a federal lien can attach; and that the district court was without jurisdiction to issue an injunction affecting any such deposits. The Government in turn asserts that Citibank is itself the debtor and that a lien attached to this debt in New York; that the federal lien attached even if the situs of the debt be outside the United States; and that in any event, personal jurisdiction over Citibank was sufficient basis for the issuance of the injunction.

I

To put these contentions in their proper perspective, a short summary of the enforcement provisions of the Internal Revenue Code of 1954 and judicial decisions thereunder is appropriate. The Code provides several alternative methods for the collection of the

³ Jurisdiction over this appeal from the granting of a preliminary injunction lies under 28 U.S.C. § 1292(1). In reviewing the preliminary injunction, this court may inquire into the jurisdiction of the district court as well as into the adequacy of the complaint for the injunction cannot stand if the complaint itself cannot stand. *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940); *John Hancock Mutual Life Ins. Co. v. Kraft*, 200 F. 2d 952 (2d Cir. 1953); *Pang-Tsu Mow v. Republic of China*, 201 F. 2d 195 (D.C. Cir. 1952), cert. denied, 345 U.S. 925 (1953); *Eighth Regional War Labor Board v. Humble Oil & Refining Co.*, 145 F. 2d 462 (5th Cir. 1944), cert. denied, 325 U.S. 883 (1945).

revenue from those who neglect or refuse to pay.⁴ Sections 6321 and 6322, 26 U.S.C., provide that a lien upon "all property and rights to property" belonging

⁴ The relevant sections provide:

§ 6321. *Lien for taxes.*

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

§ 6322. *Period of Lien.*

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

§ 6331. *Levy and Distraint.*

(a) Authority of Secretary or Delegate.—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. * * * If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

§ 6332. *Surrender of Property Subject to Levy.*

(a) Requirement.—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights

to a taxpayer who has refused or neglected to pay any tax arises at the time an assessment is made. In addition, the Service is authorized to collect such tax

(or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) *Penalty for Violation.*—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy.

§ 7402. *Jurisdiction of District Courts.*

(a) *To Issue Orders, Processes, and Judgments.*—The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of ne exaet republica, orders appointing receivers, and such other orders and processes, and to render such judgment and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

§ 7403. *Action to Enforce Lien or to Subject Property to Payment of Tax.*

(a) *Filing.*—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title or interest, to the payment of such tax or liability.

by levy on all property or rights to property either belonging to the taxpayer or on which there is a lien. 26 U.S.C. § 6331(a). Any person in possession of property or rights to property on which a levy has been made who fails to surrender such property to the Service on demand is personally liable in a sum equal to the value of the property or rights not surrendered. 26 U.S.C. § 6332(b).

The statutory scheme also provides for resort to the courts if necessary. Section 7403(a) permits the filing of a civil action in the district court to enforce a federal tax lien, whether or not levy has also been made. In addition, the district courts have jurisdiction to issue all orders or injunctions necessary or appropriate for the enforcement of the internal revenue laws. 26 U.S.C. § 7402(a).

The effect of the foregoing provisions is to create a statutory attachment or garnishment without requiring resort to the court processes normally necessary in ordinary garnishment proceedings. *United States v. Eiland*, 223 F. 2d 118 (4th Cir. 1955). Where for some reason personal jurisdiction over the delinquent taxpayer is unobtainable, the Service is able to proceed in actions quasi in rem to enforce its lien on specific property belonging to the taxpayer within the jurisdiction of the court. See *United States v. Balanovski*, 236 F. 2d 296 (2d Cir. 1956), cert. denied, 352 U.S. 968 (1957).

The crucial question here is whether appellant holds property or rights to property of the taxpayer Omar subject to the jurisdiction of the district court.⁵ The

⁵ For the sake of brevity, future references in this opinion to "property belonging to the taxpayer" are to be taken to include "rights to property" as well.

nature of Omar's right against Citibank arising out of a deposit made in Citibank's Montevideo branch bank is to be determined by state law for the tax lien statute "creates no property rights but merely attaches consequences, federally defined, to rights created under state law." *United States v. Bess*, 357 U.S. 51, 55 (1958); see *Aquilino v. United States*, 363 U.S. 509 (1960); *Raffaele v. Granger*, 196 F. 2d 620 (3d Cir. 1952).

The proper place to sue to enforce a lien is in the district in which the property is located. *United States v. Dallas National Bank*, 152 F.2d 582 (5th Cir. 1945). Absent jurisdiction over the person of Omar, this action can proceed only on the ground that Citibank's debt to Omar is within the jurisdiction of the district court. *Hanson v. Denckla*, 357 U.S. 235 (1950), made explicit what had been assumed since *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877), namely, that a state has no right "to enter a judgment purporting to extinguish the interest of such a person [over whom it has no personal jurisdiction] in property over which the court has no jurisdiction." 357 U.S. at 250.

The Government argues that the situs of the debt is irrelevant because a bank account creates a debtor-creditor relationship which is subject to levy, *United States v. Bowery Savings Bank*, 297 F. 2d 380 (2d Cir. 1961); *United States v. Manufacturers Trust Co.*, 198 F. 2d 366 (2d Cir. 1952); *United States v. Third National Bank & Trust Co.*, 111 F. Supp. 152 (M.D. Pa. 1953), and that, therefore, jurisdiction exists in the district court because the "obligation of the debtor to pay clings to and accompanies him wherever he goes." *Harris v. Balk*, 198 U.S. 215, 222 (1905). Although the Government correctly characterizes the relationship between bank and depositor, its argument

merely begs the determinative question, namely, who is the actual debtor in this case, the appellant or its branch banks. The nature of garnishment proceedings is such that the garnishor obtains no greater right against the garnishee than the garnishee's creditor had. *Harris v. Balk*, *supra*, at 222; *Karno-Smith Co. v. Maloney*, 112 F. 2d 690, 692 (3d Cir. 1940); *Wheeler v. Thomas*, 31 F. Supp. 702 (D.C.D.C. 1940). But *cf.* *United States v. Manufacturers Trust Co.*, *supra*. Thus, only if Omar could sue appellant in New York to recover his deposit, can the Government, as Omar's creditor, sue in New York. Inquiry, therefore, must be made into the nature of the debt owed to Omar under state law.

A review of the New York cases indicates a consistent line of authority holding that accounts in a foreign branch bank are not subject to attachment or execution by the process of a New York court served in New York on a main office, branch or agency of the bank. See Comment, *Garnishment of Branch Banks*, 56 Mich. L. Rev., 90 (1957). This doctrine finds its inception in English law. An important case is *Richardson v. Richardson & National Bank of India, Ltd.*, [1927] Probate 228, 137 L.T. R492, 163 L.T. 450, involving an attempt by a wife to obtain a garnishee order against the account of her husband in a bank whose head office was in London. The question presented was whether the garnishee order could extend to deposits to the husband's credit in branch banks in Kenya and Tanganyika. The Court, after reviewing prior English authorities such as *Woodland v. Fear*, 7 E. & B. 519 (1857) and *Rex v. Lovitt*, [1912] A.C. 212 (P.C.), found that the contractual obligation between bank and customer contains certain implied terms, these being that (1) the promise of the bank is to repay at the branch

where the account is kept; and (2) the bank is not required to pay until payment is demanded—at the branch where the account is kept. Therefore, since the debt of the bank at its main office did not extend to deposits in its branch banks, it was not property within the jurisdiction of the English court and was not subject to attachment there.

An early case in New York, *Chrzanowska v. Corn Exchange Bank*, 173 App. Div. 285, 159 N.Y.S. 385 (1st Dep't 1916), affirmed, 225 N.Y. 728, 122 N.E. 877 (1919), dealing with the relationship between branch banks, established the proposition that domestic branches within the same city were to be regarded as distinct and separate entities and that deposits made in branch banks are payable there and only there. The court said: "the different branches were as separate and distinct from one another as from any other bank." 173 App. Div. at 291, 159 N.Y.S. at 388. But see *Konstantinidis v. The S.S. Tarsus*, 196 F. Supp. 433 (E.D.N.Y. 1961). This view was thereafter applied to foreign branches with respect to the collection of forwarded paper, the court stating that "the branch is not a mere 'teller's window'; it is a separate business entity." *Pan-American Bank & Trust Co. v. National City Bank*, 6 F. 2d 762, 767 (2d Cir.), cert. denied, 269 U.S. 554 (1925). Furthermore, the contract between the bank and a depositor in a foreign branch is to pay in the currency of the branch in which the deposit is made. *Sokoloff v. National City Bank*, 250 N.Y. 69, 164 N.E. 745 (1928); *Zimmerman v. Hicks*, 7 F. 2d 443 (2d Cir. 1925), affirmed sub nom. *Zimmermann v. Sutherland*, 274 U.S. 253 (1926). The separate entity theory is subject only to the exception that if the branch be closed or if demand for payment is refused at the branch, an action against the main office will

lie. *Sokoloff v. National City Bank*, 239 N.Y. 158 145 N.E. 917 (1924); *Richardson v. Richardson & National Bank of India, Ltd., supra.**

Bluebird Undergarment Corp. v. Gomez, 139 Misc. 742, 249 N.Y.S. 319 (City Ct., N.Y. Cty. 1931), dealt with the scope of a warrant of attachment served on the main office of a bank located in New York involving an account of a defendant outside the United States. The issue arose on a motion to compel the bank to produce information showing whether the defendant had any sums on account in the bank's Puerto Rico branch. Relying on the separate entity theory espoused in *Richardson* and *Chrzanowska*, the court found that the defendant could not have commenced an action in New York to recover his deposit in Puerto Rico. The court in its opinion said:

"Not only are branch banks separate entities, but deposits made in a branch bank are payable there and there only * * *. A branch bank being separately indebted to its depositor, the existing obligation lies primarily between such branch bank and its depositor. The conclusion follows as a necessary corollary that the debt owed by a branch finds its situs within the territorial jurisdiction of such branch."

139 Misc. at 744, 249 N.Y.S. at 321-22. See also *Philipp v. Chase National Bank*, 34 N.Y.S. 2d 465 (Sup. Ct., N.Y. Cty. 1942); *Walsh v. Bustos*, 46 N.Y.S. 2d 240 (City Ct., N.Y. Cty. 1943).

In *Clinton Trust Co. v. Compania Azucarera Central Mabay S.A.*, 172 Misc. 148, 14 N.Y.S. 2d 743 (Sup. Ct., N.Y. Cty., affirmed without opinion, 258 App. Div. 780 (1st Dep't 1939)), the court was faced

* For a discussion of the legal problems arising out of the growth of branch banking, see Fordham, *Branch Banks as Separate Entities*, 31 Colum. L. Rev. 975 (1931).

with an application to direct Chase National Bank and the Royal Bank of Canada to answer certain questions concerning the status of deposit accounts of the defendant in their branch banks in Havana, Cuba. In denying the application, the court relied on the authorities already discussed, but found additional support for its conclusion with respect to Chase in 12 U.S.C. § 604. That section provides that:

“Every national banking association operating foreign branches shall conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office, and shall at the end of each fiscal period transfer to its general ledger the profit or loss accrued at each branch as a separate item.”

See also *Pan-American Bank & Trust Co. v. National City Bank*, *supra*.

Later cases in New York, while still resting on the separate entity theory, have stressed the policy justifications underlying the rule. In *Cronan v. Schilling*, 100 N.Y.S. 2d 474, 476 (Sup. Ct., N.Y. Cty. 1950), the Court stated:

“Unless each branch of a bank is treated as a separate entity for attachment purposes, no branch could safely pay a check drawn by its depositor without checking with all other branches and the main office to make sure that no warrant of attachment had been served upon any of them. Each time a warrant of attachment is served upon one branch, every other branch and the main office would have to be notified. This would place an intolerable burden upon banking and commerce, particularly where the branches are numerous, as is often the case.”

Similarly in *Newtown Jackson Co. v. Animashaun*, 148 N.Y.S. 2d 66 (Sup. Ct., Nassau Cty. 1955), the court found that the rule rested on two grounds: (1) the

situs of the debt is at the branch where the account is carried; (2) the crippling effect a contrary rule would have on banking practice involving branch banks in distant corners of the globe.

Most recently, the rule has received the sanction of the New York Court of Appeals in *McCloskey v. Chase Manhattan Bank*, 11 N.Y. 2d 936 (1932), which was an action to recover (by attachment) in New York moneys payable at a branch of the New York bank in Germany. The funds were held not to be subject to New York attachment. The Court of Appeals, without opinion, affirmed the judgment granting defendant's motion to dismiss the complaint.

The Government seeks to vitiate the effect of these cases by contending that they relate merely to state-imposed restrictions upon the remedy of a creditor of a depositor, stressing the fact that none of these cases involved an actual attempt by a depositor to demand payment in New York of a deposit made in a branch bank abroad.¹ Relying on *United States v.*

¹ *Varga v. Credit-Suisse*, 2 A.D. 2d 596, 157 N.Y.S. 2d 391 (1st Dep't 1956) is urged by the Government as authority for the proposition that a depositor may sue a New York branch of a foreign bank with respect to an account in another foreign branch of the bank. However, that case involved a suit for breach of contract arising out of the alleged wrongful transfer of funds deposited in a Hungarian branch. The sole question decided there was that § 200, sub. 3 of the New York Banking Law, did not prevent a suit against an agent of a foreign bank in New York where the cause of action arose outside of New York. In addition, although the question was not reached by the court, it is possible that the action might be governed by the rule of *Sokoloff v. National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924), which permitted an action against the main office where payment had been refused at a branch office. Here, since the funds had allegedly been transferred, no demand would even be necessary. Cf. *Sokoloff v. National City Bank*, 250 N.Y. 69, 80-81, 164 N.E. 745, 749 (1928).

Bess, supra, it argues that state-created restrictions on enforcement remedies are inoperative to prevent the attachment or enforcement of federal tax liens.*

This argument fails to recognize the full import of the New York cases. The reason that attachment fails is in no way due to any peculiar vagaries in the attachment remedy itself; rather, it is the result of the New York substantive rule that there is no obligation due at the main branch to a depositor in another branch and, therefore, no property subject to attachment within the jurisdiction of the New York courts.*

* In *Bess*, after holding that the federal lien did not attach to the proceeds of an insurance policy on the life of the insured but only to the cash surrender value of the policy, the Court rejected the contention that no federal lien attached to the cash surrender value because under state law that property right was not subject to creditors' liens. Once it was determined under state law that a property right existed in the insured taxpayer, the state attachment law became irrelevant.

* Further support for this conclusion can be garnered from the refusal of the New York courts to extend § 916(3) of the New York Civil Practice Act to these cases. See *Cronan v. Schilling*, 100 N.Y.S. 2d 474 (Sup. Ct., N.Y. Cty. 1950); Case-note, Branch Banking as Separate Entity for Attachment Purposes, 48 Cornell L.Q. 333 (1963). That section provides for attachment upon: "a debt, arising under or on account of a contract * * * due * * * to a resident or non-resident person or corporation, from a resident or non-resident person or corporation, upon whom or which service of process may be had within the county, provided that an action could be maintained by the defendant within the state for the recovery of such debt at the maturity thereof or where the debt consists of a deposit of money not to be repaid at a fixed time but only upon special demand, that such demand therefor could be duly made by defendant within the state."

If the substantive law of the state were, as the Government urges, that a depositor in a foreign branch could demand payment at a New York branch, then § 916(3) by its terms would

Furthermore, the policy justifications offered to support the rule rest not on the inappropriateness of attachment as a remedy, but on the more fundamental notion that to require any branch to respond to the demand of a depositor in another branch anywhere in the world would impose an intolerable burden on the banking community. This would be the result of not only the impracticality of requiring constant transmission of reports on the status of accounts in one branch to all other branches, but on the complications that arise out of the fact that different branches may be subject to the laws of other countries and may be dealing in different currencies.¹⁰

The Government also places some reliance on the rejection of the separate entity theory, based on 12 U.S.C. § 604, in *First National City Bank v. Internal Revenue Service*, 271 F. 2d 616 (2d Cir. 1959). There this Court held that this section was not a bar to requiring the bank to produce bank records, physically located in its branch bank in Panama, relating to an account of a Panama corporation. There are two ready answers to this contention. In the first place, in only one New York case has there even been partial reliance on 12 U.S.C. § 604. See *Clinton Trust Co. v. Compania Azucarera Central Maby S.A.*, *supra*. Secondly, *First National City* did not reject

be applicable to the case of attachment by a creditor of the depositor. The section is, however, inapplicable only because the state rule is that a depositor could not successfully demand payment in New York.

¹⁰ Problems arising out of the fact that different branches deal with different currencies include questions of the possible necessity of securing a license in order to convert the foreign currency into American dollars, the effective date for determination of the rate of exchange and the selection of the proper exchange rate when multiple exchange rates are in force.

the separate entity theory for all purposes and under all circumstances. Thus, this Court there recognized that a prior decision in this Circuit, *Pan-American Bank & Trust Co. v. National City Bank*, *supra*, which relied in part on § 604, had held that "in various commercial transactions between a branch bank and its home office the rights involved are to be determined as though the branch was acting at arm's length as an independent entity." *First National City Bank v. Internal Revenue Service*, *supra*, at 619. The court in no way intimated disapproval of the *Pan-American* opinion; it merely found that the case at bar, involving a question of whether the main office had sufficient control over its branch to order the return of certain records for examination, was distinguishable from the arm's length transaction in *Pan-American*.

The court below rested its decision to issue the injunction on the grounds that the court having personal jurisdiction over Citibank, it had the power to compel the performance of acts respecting property situated outside its jurisdiction. The district court relied on cases sustaining the power of the district court to require the production of records held in branch banks pursuant to a summons served upon its home office.¹¹ *First National City Bank v. Internal*

¹¹ A recurring problem in these cases is the effect that is to be given to the fact that compliance with the production order may subject the party or witness to civil liability or criminal penalties under the law of the country in which the records are located. Under these circumstances, the burden of proceeding by appropriate process in the courts of the foreign country shifts to the party seeking production, with some vague duty on the part of the person subpoenaed to cooperate in this endeavor. See Note, *Subpoena of Documents Located in Foreign Jurisdiction Where Law of Situs Prohibits Removal*, 37 N.Y.U.

Revenue Service, supra; *Application of Chase Manhattan Bank*, 297 F. 2d 611 (2d Cir. 1962). But *cf. Ings v. Ferguson*, 282 F. 2d 149 (2d Cir. 1960). Furthermore, in *United States v. Ross*, 302 F. 2d 831 (2d Cir. 1962) the power of a district court to order the taxpayer, over whom personal jurisdiction had been obtained, to transfer stock certificates, located in the Bahamas, to a receiver appointed by the district court, was upheld. See also *S.E.C. v. Minas de Artemisa, S.A.*, 150 F. 2d 215 (9th Cir. 1945).

Here, however, the absence of personal jurisdiction over the taxpayer Omar is a crucial factor in distinguishing the *Ross* case. Since Omar was not before the court, no personal judgment could have been rendered against it. Only a judgment *quasi in rem* extinguishing Omar's rights in any property it might have within the district court's jurisdiction would be valid. A prerequisite to such jurisdiction must be power over the *res*. *Hanson v. Denckla, supra*.

Although Citibank might be liable personally for wrongfully refusing to surrender property on which the Government holds a lien, 26 U.S.C. § 6332, any such action would have to be predicated on the existence of a valid lien. See 26 U.S.C. § 7403. Since the property is without the *United States*, no valid lien ever attached.

The Government, however, asserts that the words of the tax lien statute, 26 U.S.C. § 6321, have a global application and that the lien attaches to property of the taxpayer anywhere in the world. If taken literally, the statute might be susceptible to this interpre-

L. Rev. 295 (1962). Similar assertions were made by the defendants in this case. The court below held that defendants had failed to offer any proof on the applicable foreign law, but if it were later shown that compliance would violate foreign law, the injunction could be modified accordingly.

tation, but to so construe it would do violence to the settled principle of statutory construction that legislation is meant to apply only within the territorial jurisdiction of the United States unless a contrary intention appears. *Blackmer v. United States*, 284 U.S. 421, 437 (1932); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949); *Lauritzen v. Larsen*, 345 U.S. 571, 577 (1953); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963). The Supreme Court has made manifest its reluctance to read an extraterritorial force into statutes when to do so would extend coverage beyond places over which the United States has legislative control, *Foley Bros., Inc. v. Filardo*, *supra*, or would interfere with the rights of other nations, *Lauritzen v. Larsen*, *supra*.

It has long been a general rule that one sovereignty may not maintain an action in the courts of another state for the collection of a tax claim. *Government of India v. Taylor*, [1955] A.C. 516; *Moore v. Mitchell*, 28 F. 2d 997 (S.D.N.Y. 1928), *aff'd*, 30 F. 2d 600 (2d Cir. 1929), *aff'd* on other grounds, 281 U.S. 18 (1930); *State of Colorado v. Harbeck*, 232 N.Y. 71, 133 N.E. 357 (1921). *Contra*, *State ex rel. Oklahoma Tax Comm'n v. Rodgers*, 238 Mo. App. 1115, 193 S.W. 2d 919 (1946). The nations of the world have only recently begun to deal with the problem of extraterritorial collection of tax revenues through the medium of negotiated tax treaties providing for mutual cooperation.¹² See Note, International Enforcement of Tax Claims, 50 Colum. L. Rev. 490 (1950). Absent an explicit indication to the contrary, there should not be attributed to Congress an intent to give the courts of this nation, in this highly

¹² No such treaty exists with Uruguay. 4 CCH Fed. Tax Rep. ¶ 4281.

sensitive area of intergovernmental relations, the power to affect rights to property wherever located in the world. The apparent necessity of tax treaties underscores the conclusion that Congress has seen fit to handle this problem in another manner.

III

Although the result here is in large part dictated by a state rule having its genesis in policy considerations having little to do with the collection of the revenue, application of that rule to the facts here comports with sound reason and public policy. Unfortunate as it may be that Omar will be able to escape, at least partially, from a possible tax liability involving substantial sums, in the long run it is unlikely that a different rule here would provide much consolation to the Internal Revenue Service. The artful tax dodger would not have to be too sophisticated to realize that all he need do to escape liability is place his deposits in a bank of local origin that is beyond the power of our courts. This would lead only to harmful consequences for our banking system abroad without any concomitant benefits here at home.

In addition, the rule suggested by the Government would have to work both ways. As yet, our courts have been faced only with cases seeking to attach deposits in foreign branches of American banks by service on the home office here, *Bluebird Undergarment Corp. v. Gomez*, *supra*; *Clinton Trust Co. v. Compania Azucarera Central Mabay S.A.*, *supra*; *Phillips v. Chase National Bank*, *supra*; *McCloskey v. Chase Manhattan Bank*, *supra*, and others seeking to attach deposits in foreign banks by service on a branch of such a bank doing business in New York. *Clinton Trust Co. v. Compania Azucarera*

Central Mabay S.A., supra; Walsh v. Bustos, supra; Cronan v. Schilling, supra; Newtown Jackson Co. v. Animashun, supra However, it is inconceivable that the issuance of an injunction by a court of a foreign country against an American branch bank affecting the accounts or activities of the head office in the United States would be looked upon with favor. The untoward difficulties and potential conflict between the laws of different nations that such a doctrine would produce militate against giving it support here.

The court concludes that the injunction issued by the district court was beyond its jurisdiction as to deposits held abroad that are collectible only outside the United States. The record, however, does not make clear whether any special arrangements may have existed between Citibank and Omar making the deposit payable, not in pesos at Montevideo, but in dollars in New York. The injunction should therefore be modified in such a way as to preserve any rights of the Government should it appear that Omar's accounts were in fact payable in New York.

Vacated in part and remanded for modification of the injunction in conformity with this opinion.

HAYS, Circuit Judge, dissenting:

In his learned opinion my brother Moore has almost completely lost sight of what it is that we are asked to review. The extensive dissertation on the nature and characteristics of attachable lienable property under New York law is an admirable display of my colleague's well known erudition and of his customary careful and exhaustive research. But it has little if anything to do with the case in hand.

The order appealed from was issued by the district court under the authority of § 7402(a) of the Internal Revenue Code of 1954 which provides:

"The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers; and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws."

The order of the district court does not purport to establish or enforce any lien on any property or to direct the payment of any sums whatever. It is a simple order, confined to a direction to the appellant (and certain others) to keep the property of the taxpayer which they now hold. The order reads:

"ORDERED, that pending the determination of this action or until further order of this Court, the defendants, Lazard Freres & Co., Lehman Brothers, Belgian-American Banking Corp. and First National City Bank of New York, or any of them, be and they are hereby restrained from selling, transferring, pledging, encumbering, disposing of, or distributing any property or rights to property of Omar, S.A., including, but not limited to, any sums, credits, stock, or bonds or any interest, dividends, or other earnings thereon now held for or for the account of the said Omar, S.A., by them or by any of their branches, agents, or nominees whether

located within the United States or not and whether their branches, agents, or nominees are located within the United States or not."

The record indicates that the district court was completely justified in issuing the injunction. In May 1962 counsel for taxpayer told government representatives that if the government should attempt to establish tax liability, taxpayer would liquidate its holdings in the United States. Later one of taxpayer's directors came to the United States and began a systematic liquidation of those holdings. By October 31, 1962, when the Commissioner assessed jeopardy assessments totalling \$19,300,000, taxpayer had already transferred at least \$2,300,000 out of the country.

The order is merely a preliminary injunction to prevent further dissipation of taxpayer's assets. The district court did not determine, nor was there any occasion for its determining, whether the government's lien attached to all the property immobilized by the order, or what part of such property the government would be able to get possession of in the later stages of this proceeding or in some other proceeding.

There is no doubt that the district court, having in personam jurisdiction over appellant, had the power to issue its order. Indeed appellant does not deny such power except with respect to property of the taxpayer held by appellant's foreign branches. The district court has the power to order the appellant over whom it has personal jurisdiction to act or to refrain from acting both within and without the territorial jurisdiction of the court. *United States v. Ross*, 302 F. 2d 831 (2d Cir. 1962). It is of no consequence, as the majority believes, that the court does not have jurisdiction over Omar. The court's jurisdiction is not in any sense jurisdiction over the res, it is jurisdiction over the person of the appellant.

The present issue as to property of the taxpayer which is held by appellant's foreign branches is not as the majority believes, whether that property can be recovered in the pending proceeding. The only issue is whether appellant has power to carry out the order of the court with respect to that property. It is clear that appellant has that power (*First National City Bank v. Internal Revenue Service*, 271 F. 2d 616 (2d Cir. 1959), *cert. denied* 361 U.S. 948 (1960)), and indeed appellant does not deny that it could prevent its foreign branches from releasing property to the taxpayer.

Appellant cannot at this stage be permitted to argue that, although it does not deny that it could effectively prevent its foreign branches from paying out money to the taxpayer, it cannot be required to do so because the government may not be able to recover that money in the present suit. Neither the district court nor this court can or should decide on the present record that the government has no recourse by which it could ever recover the property which the government seeks to protect from dissipation. Even if it should be granted that in the present proceeding the government could not recover property of the taxpayer held by a foreign branch, is this court now prepared to hold, for example, that there is no possibility that a receiver appointed under the authority of § 7402(a) would be able to proceed against taxpayer's property under any circumstances or anywhere other than New York? The majority's reference to the absence of a tax treaty with Uruguay is irrelevant since not only is the absence of such a treaty not dispositive, but there is nothing in the record before us to show that foreign branches of appellant other than that in Montevideo do not hold property of the taxpayer.

The result of the present decision is a wholly unwarranted limitation on the government's power to preserve property of delinquent taxpayers from dissipation pending proceedings to recover that property. With respect I must dissent.

APPENDIX B
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 196—September Term, 1963.

(Argued October 18, 1963 Decided January 13, 1964)

Docket No. 27980

UNITED STATES OF AMERICA, APPELLEE,

v.

FIRST NATIONAL CITY BANK, APPELLANT,

and

OMAR, S.A., a Uruguayan corporation; LAZARD FRERES
& Co.; LEHMAN BROTHERS; BELGIAN-AMERICAN
BANKING CORP.; BELGIAN-AMERICAN BANK AND
TRUST Co.; and FIRST NATIONAL CITY TRUST Co.,
DEFENDANTS.

Before: LUMBARD, *Chief Judge*, CLARK, WATERMAN,
MOORE, FRIENDLY, SMITH, HAYS and MARSHALL,
Circuit Judges.

PER CURIAM:

The court having sat *in banc* to hear the appeal, with the exception of Judge Kaufman who did not participate, and due deliberation having been had thereon, Judges Lumbard, Waterman, Moore, and Friendly vote to reverse the order of the district

court for the reasons set forth in Judge Moore's opinion reported at 321 F. 2d 14, and Judges Smith, Hays, and Marshall vote to affirm for the reasons set forth in Judge Hays' opinion reported at 321 F. 2d 25.¹ The order of the district court, reported at 210 F. Supp. 773 (1962), is accordingly reversed.

Upon application therefor, the court will grant a stay, pursuant to Rule 28(c), pending application for certiorari to the Supreme Court of the United States.

¹ Prior to his death Judge Clark had indicated his intention to vote for affirmance.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of January one thousand nine hundred and sixty-four.

Present:

Hon. J. EDWARD LUMBARD, *Chief Judge,*

Hon. STERRY R. WATERMAN,

Hon. LEONARD P. MOORE,

Hon. HENRY J. FRIENDLY,

Hon. J. JOSEPH SMITH,

Hon. PAUL R. HAYS,

Hon. THURGOOD MARSHALL,

Circuit Judges.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

OMAR, S.A., LAZARD FRERES & Co., ET AL., DEFENDANTS,

FIRST NATIONAL CITY BANK OF NEW YORK, (FIRST
NATIONAL CITY BANK), DEFENDANT-APPELLANT.

Appeal from the United States District Court for
the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed.

Further ordered that the judgment of this Court of June 26, 1963, be and it hereby is vacated.

A. DANIEL FUSARO, *Clerk.*

APPENDIX D

Internal Revenue Code of 1954:

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C., 1958 ed., Sec. 6321.)

SEC. 7402. JURISDICTION OF DISTRICT COURTS.

(a) *To Issue Orders, Processes, and Judgments.*—The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

(26 U.S.C., 1958 ed., Sec. 7402.)

SEC. 7403. ACTION TO ENFORCE OR TO SUBJECT PROPERTY TO PAYMENT OF TAX

(a) *Filing.*—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attor-

ney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, or whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

* * * * *

(26 U.S.C., 1958 ed., Sec. 7403.)

SEC. 1655. LIEN ENFORCEMENT; ABSENT DEFENDANTS

In an action in a district court to enforce any lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within the district, where any defendant cannot be served within the State, or does not voluntarily appear, the court may order the absent defendant to appear or plead by a day certain.

Such order shall be served on the absent defendant personally if practicable, whenever found, and also upon the person or persons in possession or charge of such property if any. Where personal service is not practicable, the order shall be published as the court may direct, not less than once a week for six consecutive weeks.

If an absent defendant does not appear or plead within the time allowed, the court may proceed as if the absent defendant had been served with process within the State, but any adjudication shall, as regards the absent defendant without appearance, affect only the property which is the subject of the action. When a part of the property is within another district, but within the same state, such action may be brought in either district.

Any defendant not so personally notified may, at any time within one year after final judgment, enter his appearance, and thereupon the court shall set aside the judgment and permit such defendant to plead on payment of such costs as the court deems just.

(28 U.S.C., 1958 ed., sec. 1655.)

Office Supreme Court, U.S.

FILED

MAY 13 1964

JOHN F. DAVIS, CLERK

No. ~~100~~ 59

IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

UNITED STATES OF AMERICA, *Petitioner*,

v.

FIRST NATIONAL CITY BANK, *Respondent*,

—and—

OMAR, S.A., a Uruguayan corporation; LAZARD FRERES &
CO.; LEHMAN BROTHERS; BELGIAN-AMERICAN BANKING
CORP.; BELGIAN-AMERICAN BANK AND TRUST CO.; and
FIRST NATIONAL CITY TRUST CO., *Defendants*.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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JOHN E. HOFFMAN, JR.
Of Counsel

May 1964

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1963

No. 998

UNITED STATES OF AMERICA, *Petitioner,*

v.

FIRST NATIONAL CITY BANK, *Respondent,*

—and—

OMAR, S.A., a Uruguayan corporation; LAZARD FRERES & Co.; LEHMAN BROTHERS; BELGIAN-AMERICAN BANKING CORP.; BELGIAN-AMERICAN BANK AND TRUST Co.; and FIRST NATIONAL CITY TRUST Co., *Defendants.*

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the district court is reported at 210 F. Supp. 773. The opinion of the court of appeals for the second circuit, and the dissenting opinion (App. A of Petition) are reported at 321 F.2d 14. The *per curiam* opinion of the court of appeals (App. B of Petition) on the *en banc* rehearing is not reported.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

Should this Court review the finding of the court of appeals that the power of a district court over the head office management of an American bank did not justify the court in requiring that bank to take action in a foreign country with respect to property of another, there situated, which was beyond the jurisdiction of both the Internal Revenue Service and the court itself?

Statutes Involved

The pertinent statutes are set forth in Appendix D to the Petition.

Statement

The Petition sets forth a grievance: that the Government has been denied its desires. It does not show that this denial was the result of an error. In essence, the Petition sets forth a claim by the Government that it requires certain powers and that its administrative function is handicapped by the refusal of the district court to indulge its desire for these new powers. No real contention is made that the administration has been deprived of a power previously exercised or lawfully enjoyed. Indeed, the Government conceded in open court that the powers it seeks are novel.

In consequence, the Petition is in effect a legislative memorandum, rather than an assignment of judicial error. As such it fails to meet the requirements of this Court.

ARGUMENT

I

There is No Credible Contention That the Decision of the Court of Appeals was Erroneous in Law.

The Petition makes three assertions as grounds for issuance of the writ. The first of these is that the decision of the court of appeals "severely hampers the Internal Revenue Service in its expanding efforts" to collect amounts allegedly due to it from nonresident aliens and American citizens residing abroad. This is a request for expanded powers and not an assignment of error. So far as it is an argument of policy it is, we submit, unsound and reference to the Petition itself demonstrates its inaccuracy. (Cf. *infra* § II pp. 4 to 5).

The second assertion is equally devoid of merit. It is a hypothetical argument that the Government *might* be able to secure a judgment against the taxpayer (Omar) upon the further hypothetical premise that it *might*, at some future date, be able to secure personal jurisdiction of Omar. Again, there is no serious suggestion that the decision of the court below was erroneous in the context of the record before it; the allegation is that the court might have been able to formulate a new rule of law helpful to the Government, albeit disastrous for innocent third parties.

The third assertion is that the court below might have been able to indulge the Government by disregarding the issue which the court of appeals, in its judicial discretion and responsibility, accurately found to be determinative.

In summary, therefore, the grievance of the Government is not that the court below erroneously stated the law,¹ but rather that the court below failed to exercise sufficient ingenuity to find a way around the law which would justify the Government's efforts to arrogate to itself non-existent

¹ The decision of the court of appeals has received favorable comment in legal periodicals. 64 Colum. L. Rev. 774 (1964); 62 Mich. L. Rev. 1084 (1964).

powers, the exercise of which would irreparably and unjustifiably damage the foreign banking system of the United States.

II

The Petition Itself Discloses Lack of Jurisdiction in This Court.

As indicated above, the gravamen of the Petitioner's complaint is that it is denied an administrative power which it greatly desires, rather than that it has been deprived of an existing right through misapprehension or misapplication of the law. In consequence, the Petition is addressed to jurisdiction which this Court does not have. It is a legislative rather than a judicial appeal.

Beyond this, the Petition sufficiently discloses that there is no objective policy reason for acceding to the demands of the Government.

The complaint is that the reasoned decision of the court of appeals "severely hampers the Internal Revenue Service in its expanding efforts to collect" (page 7) presently undetermined, but "predictable" tax liabilities in addition to "some \$2,140,000 [which] *may* be on deposit in respondent's foreign branches" (page 9; emphasis and material in brackets added). At the same time, at page 19 of the Petition, the Government says "the Treasury Department plans to limit the institution of these enforcement suits to those cases in which the Internal Revenue Service has reason to believe that a taxpayer beyond the jurisdiction of the United States courts has been transferring funds out of the country to a foreign office in order to hinder or delay tax collection. [footnoted] The Treasury Department also proposes to limit the authority to levy to such a situation".

It does appear that, whether as a matter of policy or of law, the Government has recognized the undesirability of attempting to make good the boast often asserted in the courts below that a tax lien is global in its scope, and

extra-territorial in its application to property in foreign countries. The court of appeals found that the tax lien did not apply to accounts with a situs outside the United States; it is hard to understand, therefore, how the Government, now formally abandoning assertion of extra-territorial rights, can hope for credence in its contention that the decision of the court of appeals "severely hampers its activities".

Since the decision of the court of appeals, we have been advised that on the day the legal papers were served in New York; Omar, the allegedly delinquent taxpayer, had no property whatsoever at any of the foreign branches of the Respondent, except for an inconsequential amount at the Montevideo, Uruguay, branch and that Omar (which is contesting the validity of the assessment in the Tax Court) has now voluntarily placed this amount within the jurisdiction of the district court.²

² A letter dated May 8, 1964 to Respondent from counsel for Omar is annexed hereto as Appendix A. It appears that copies of that letter have been sent to the Solicitor General and the Clerk of the Court. The substance of that letter is that on the day the legal papers were served in New York, October 31, 1962, the Montevideo, Uruguay, branch of the bank held for the account of Omar dollars and Uruguayan pesos equivalent to the sum of U. S. \$2,052.88; that no other funds were then, or since, held by Respondent for Omar outside of the United States; and that Omar has directed the Montevideo branch of the bank to remit that sum to the New York office of the bank to be held in New York for the account of Omar.

Our client has advised us that on May 7, 1964 it in fact received in New York, from the Montevideo branch, \$2,052.88 to be held for the account of Omar.

It will be noted that the only relief sought against Respondent by the Complaint is to "compel . . . [Respondent] . . . to return all property of defendant-taxpayer, Omar, S.A., to the jurisdiction of this Court for disposition and application consistent with the interests of plaintiff and for enforcement of plaintiff's lien on said property and rights to property; . . ." (Appendix to Appellant's Brief before Court of Appeals, p. 16a)

We feel that it is our obligation to bring these facts to the attention of the Court, since they raise the question of whether the case is moot. *Taylor v. McElroy*, 360 U. S. 709 (1959); *United States v. Alaska S.S. Co.*, 253 U. S. 113 (1920).

Aside from the question whether the action of the alleged taxpayer has rendered the action and, therefore, this appeal, moot, it is evident that the suggestion in the Petition of the amounts involved, and thus of the importance to the Government, appears to be contrary to the fact.

III

The Petition Itself Discloses That Reversal of the Decision Below Would do Irreparable Damage to the Respondent.

At the very outset, the Respondent pointed out that it would be subjected to multiple liability if it endeavored to comply with the order of the district court. This contention was belittled, if not specifically challenged, in the Government's Petition for Rehearing after rendition of the opinion below. Upon rehearing, the Respondent submitted opinions of counsel in 6 countries which confirmed the threat of multiple liability.

The Government has paid lip service to equity by saying that if compliance with the order "were shown to violate foreign law, the injunction would be modified" (Petition, p. 6) and from this concession it concludes that the injunction is not "unfair to respondent in any respect". The Government's concession has never gone beyond recognition that the Respondent should not be expected to violate the criminal law of another country; it has, indeed, suggested that to incur civil liability may not be a defense. In any event, it is clear that once liability for conversion or breach of a money contract has occurred, a modification of the order could not relieve the Respondent from the consequences of its conduct in the foreign country. In the face of this undeniable exposure to multiple liability and the evident inability of the district court to protect its order, the Petition is revealed as insufficient.

It is no answer to say that Respondent "might" be held entitled to reimbursement from the United States (Petition

p. 18). In the face of the opinions of counsel (Appendix A to Respondent's Brief in the court of appeals on the *en banc* rehearing—that Brief has been certified to this Court) and the representations made by the *amici curiae*, it is not accurate to say that the existence of potential liability has not been established.

The Government has shown no good cause why the decision of the court of appeals requires judicial review by this Court. Any relief which the Internal Revenue Service desires by way of expanded powers should be sought in the form of legislation and treaties with the affected foreign countries.

CONCLUSION

The Petition for a Writ of Certiorari Should be Denied.

Respectfully submitted,

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May 8, 1964

re United States of America v. First National City Bank
Supreme Court of the United States
October Term 1963, Docket No. 998

First National City Bank
399 Park Avenue
New York, N. Y.

Attention of Mr. William T. Loveland
Assistant Vice President

Dear Sirs:

The undersigned are the attorneys of record for Omar, S.A. in a proceeding pending in the Tax Court of the United States, Docket No. 2041-63. The Tax Court proceeding raises issues as to liability for Federal income taxes claimed in a collection suit filed by the United States in the United States District Court for the Southern District of New York, Docket No. 62 Civ. 3603, in which First National City Bank is one of the defendants. The collection suit is the proceeding in which the United States is petitioning to the United States Supreme Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit. This is the proceeding referred to as the subject of this letter.

The Government's petition for a writ of certiorari states (page 9) that some \$2,140,000 of funds belonging to Omar, S.A. may be on deposit in foreign branches of First National City Bank. We are informed by Omar, S.A. that, on May 7, 1964, it remitted to you in New York City from Montevideo, Uruguay, the sum of 2,052.88 U.S. Dollars, with instructions to hold such sum in an account with you in the name of Omar, S.A. Such instructions also state that such sum is to be deemed to have been so held by you at all times on and since October 31, 1962, the date on which the Federal District Court issued its temporary order restraining you.

First National City Bank - 2

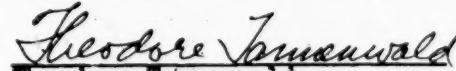
from disposing of any property held by you for the account of Omar, whether located within or without the United States. Omar has further advised us that

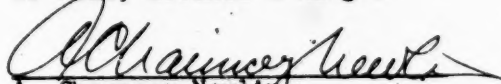
a) On October 31, 1962, your branch in Montevideo, Uruguay held for the account of Omar, S.A. 1,900 U.S. Dollars and 1,674.05 Uruguayan Pesos. (The aforesaid sum of 2,052.88 U.S. Dollars which has been remitted by Omar to you is the aggregate of 1,900 U.S. Dollars plus the United States Dollar equivalent of 1,674.05 Uruguayan Pesos computed on the basis of the rate of exchange in effect on October 31, 1962, when the rate was more favorable to the dollar than at present, and includes the balance in the account prior to such remittance.)

b) Neither your branch in Montevideo, Uruguay, nor any other branch of your bank outside the United States has held any other funds or assets for the account of Omar, S.A. on or since October 31, 1962.

In the light of extensive research by us as to the facts of this case, in connection with our representation of Omar, S.A. in the tax controversy involved, we have every reason to believe the above statements are correct.

Very truly yours,


Theodore Tannenwald
of Weil, Gotshal & Manges


A. Chauncey Newlin,
of White & Case

Counsel for Omar, S.A.

cc: Hon. Archibald Cox
Solicitor General
Department of Justice
Washington, D.C.

Hon. John F. Davis, Clerk
Supreme Court of the United States
Washington, D.C.

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Office Supreme Court, U.S.

FILED

MAY 10 1964

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

No. ~~100~~ 59

UNITED STATES OF AMERICA, *Petitioner,*
against
FIRST NATIONAL CITY BANK, *Respondent,*
and

OMAR, S. A., a Uruguayan corporation; LAZARD FRERES & CO.;
LEHMAN BROTHERS; BELGIAN-AMERICAN BANKING CORP.; BEL-
GIAN-AMERICAN BANK AND TRUST CO., and FIRST NATIONAL
CITY TRUST CO.,
Defendants.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**JOINT BRIEF FOR THE CHASE MANHATTAN BANK, THE
FIRST NATIONAL BANK OF BOSTON and BANK OF AMER-
ICA NATIONAL TRUST AND SAVINGS ASSOCIATION, AS
AMICI CURIAE, IN OPPOSITION TO THE PETITION**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1963

No. 998

UNITED STATES OF AMERICA,
Petitioner,
against

FIRST NATIONAL CITY BANK,
Respondent,
and

OMAR, S. A., a Uruguayan corporation; LAZARD FRERES &
CO.; LEHMAN BROTHERS; BELGIAN-AMERICAN BANKING
CORP.; BELGIAN-AMERICAN BANK AND TRUST CO., and FIRST
NATIONAL CITY TRUST CO.,
Defendants.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**JOINT BRIEF FOR THE CHASE MANHATTAN BANK,
THE FIRST NATIONAL BANK OF BOSTON and BANK
OF AMERICA NATIONAL TRUST AND SAVINGS AS-
SOCIATION, AS AMICI CURIAE, IN OPPOSITION TO
THE PETITION**

Opinions Below

The opinion of the United States District Court for the
Southern District of New York is reported as 210 F. Supp.
773. The opinion of the United States Court of Appeals

for the Second Circuit, and the dissenting opinion (App. A of Petition) are reported at 321 F. 2d 14. The *per curiam* opinion of the Court of Appeals (App. B of Petition), sitting *en banc* on rehearing, is not reported.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

Whether for the purpose of aiding the Government in collecting taxes allegedly owed by an alien, a United States District Court has the power to order the freezing, and ultimate transfer to the United States, of an alien's funds on deposit outside the United States with a foreign branch of an American bank, when the alien has no right to obtain payment of the funds in the United States.

Statutes Involved

The pertinent statutes are set forth in Appendix D of Petition.

Statement

The action was brought by the Government, the petitioner herein, against defendant Omar, S. A., First National City Bank ("Citibank") and the other defendants named above. The complaint alleged that defendant Omar was indebted to the United States for unpaid taxes, penalties and interest. It prayed for injunctive relief against Citibank and the other defendants, alleging that they held property of Omar encumbered by Federal tax liens. In

addition to its prayer for an injunction *pendente lite* ordering the defendants to refrain from disposing of Omar's property, the Government sought an order compelling those defendants to return all property and property rights of Omar, including any sums held abroad for the account of Omar in foreign branches of defendant banks, to the jurisdiction of the United States District Court for the Southern District of New York.

The District Court granted the Government's motion for temporary relief against all defendants (except First National City Trust Co. and Belgian-American Bank & Trust Co. which had shown satisfactorily that they did not hold property of Omar), ordering them to refrain from disposing of any property or rights to property held for Omar's account by defendants or their branches, agents or nominees, whether or not their branches, agents or nominees were located within the United States.

Defendant Citibank, the respondent herein, appealed from so much of the District Court's order as restrained the disposition of any property of Omar held outside of the United States by Citibank's foreign branches. On June 26, 1963, the Circuit Court sustained the appeal (one Judge dissenting), vacated the District Court's order in part and remanded the case for modification of the injunction. On September 19, 1963, the Circuit Court granted the Government's petition for a rehearing *en banc*. On January 13, 1964, the Circuit Court adhered to its prior decision, reversing the District Court, by a vote of 4-3.

Because of the importance of this case to the foreign operations of American banks in general, The Chase Manhattan Bank, The First National Bank of Boston, and Bank

of America National Trust and Savings Association sought, and obtained, the consent of the attorneys for the Government and Citibank to submit this joint brief, as *amici curiae*.

REASONS FOR DENYING THE PETITION

I

The Decision Below is Supported by All Applicable Authority.

The District Court had no jurisdiction to issue orders affecting the disposition of funds deposited outside the United States with a foreign branch of an American bank. Such was the holding of the Circuit Court.

Even in the dissenting opinion in the Court below, it was conceded that the Court did not in any sense have jurisdiction over the *res*. The law of New York, controlling on this point, is clear that a depositor of a foreign branch of a bank with its head office in New York has no right to obtain payment of the deposit in New York, but only where the branch is located, and that foreign branch deposits are not subject to attachment or execution by service of process on the head office in New York (See cases cited in App. A to Petition, pp. 27-34). Thus, in the present case, since the District Court had no jurisdiction over Omar and the only debtor, the foreign branch, was outside of the United States, the District Court had no power to affect the disposition of the debt. See *Hansen v. Denckla*, 357 U. S. 235 (1958). The issuance of the order by the District Court was beyond its jurisdiction, and the modification ordered by the Circuit Court was required.

The dissenting opinion of the Circuit Court failed to cite any contrary authority and, in fact, there is none. The dissent, as well as the Government, put aside long-estab-

lished legal principles governing foreign branch deposits and the policy justifications for such principles. They urged inapplicable cases in which the court had jurisdiction over the taxpayer, or over the *res*, with the result that the court's judgment controlled and protected the parties. In this case, on the other hand, the Court had no jurisdiction over the taxpayer or over the *res*. Moreover, it had no jurisdiction over the only debtor, the foreign branch which cannot be protected either by the court or its judgment.

II

The Decision Below is Entirely Consistent with United States Foreign Policy.

Aside from the fact that the Government seeks to extend the jurisdiction of the Courts of the United States to foreign assets of an alien taxpayer, this case involves serious questions with respect to United States foreign economic policy. The decision of the Circuit Court is totally consistent with the aims of that policy.

There really can be no question but that a contrary decision, freezing funds of foreign customers deposited in foreign branches of American banks and ultimately ordering their transfer to the United States, would deter the establishment, and continued maintenance, of such foreign branch deposits and, consequently, impair the successful operation of foreign branches. It would thus be in direct conflict with the avowed Congressional and Executive policy of encouraging foreign branch operations, and adversely affect the American international balance of payments.

Congress recognized the vital place of foreign branches in a sound American banking system at the very inception

of the Federal Reserve System. The Federal Reserve Act makes explicit provision for the establishment of American banking machinery in foreign countries and, by limiting restrictions to a minimum, affords the broadest opportunity for this type of export of American business.

In 1962, Congress evidenced its continued vital interest in this area through the enactment of P. L. 87-588, 76 Stat. 388 (1962), which amended the Federal Reserve Act to free foreign branches from many of the restrictions on United States domestic banking and to permit them to engage in banking on a par with indigenous institutions. This legislation, designed to improve the competitive position of these branches, was the direct result of a recommendation made by the Board of Governors of the Federal Reserve System. See **LEGISLATIVE RECOMMENDATIONS OF THE FEDERAL SUPERVISORY AGENCIES TO THE SENATE COMMITTEE ON BANKING AND CURRENCY, Study of Banking Laws (Comm. Print, 1956), p. 111.** The legislative history of P. L. 87-588 demonstrates a clear Congressional policy favoring effective foreign branch banking as an instrument to ease the problems of balance of payments and gold outflow. See S. Rep. No. 738, 87th Cong., 1st Sess. p. 2 (1961). See also H. R. Rep. No. 2047, 87th Cong., 2d Sess. (1962).

The continued vital role of foreign branch banking in the United States economy has been heavily underscored in recent reports to the Executive Branch. See, *e.g.*, **ADVISORY COMMITTEE ON BANKING TO THE COMPTROLLER OF THE CURRENCY, REPORT, National Banks and the Future (1962), p. 130; COMMISSION ON MONEY AND CREDIT, REPORT, Money and Credit (1961), p. 212.** Such reports noted the value of foreign banking operations in stimulating world trade and investment, in strengthening the American position with

respect thereto, and in reducing the drain on dollar funds by enabling American corporations to finance, in part, their own overseas activities through local currency deposits with foreign branches of American banks.

The fostering of foreign branches is thus a policy of Congress and the Executive Branch. A decision contrary to that of the Circuit Court would conflict with those clearly expressed national policies.

The Government argues that the opinion of the Circuit Court "creates evident temptations and possibilities for evasion" (Petition, p. 8). This contention, however, was answered by the Circuit Court. The Court noted:

"The artful tax dodger would not have to be too sophisticated to realize that all he need do to escape liability is place his deposits in a bank of local origin that is beyond the power of our courts. This would lead only to harmful consequences for our banking system abroad without any concomitant benefits here at home." (App. A to Petition, p. 39).

The day-to-day experiences of the Banks represented by the undersigned underscore and support this answer. The concern of the American banks engaged in international banking is not to protect the "artful tax dodger" who, through one artifice or another available in the international scene, will not be stopped by any *tour de force* concocted in this case. American international banking is, on the other hand, concerned with the many responsible individuals in commercial and industrial establishments abroad who have business contacts with the United States and are repelled by the extraordinary complexities of our tax system. Faced with uncertainty, they may well elect to avoid the risk of unwitting entanglements that might flow

from doing business with the foreign branch of an American bank. The Government asserts that the Treasury Department is planning to limit enforcement suits with respect to foreign branch deposits to situations in which the Internal Revenue Service has reason to believe tax evasion is afoot (Petition, p. 19). It should be noted that on the very day that the Petition herein was mailed, the Internal Revenue Service, oddly enough, issued a release substantially to the above effect (I.R.S., Tech. Inf. Rel. 571, April 13, 1964).¹ This release is, of course, grounded on an erroneous assumption of legal rights—that the Government can reach the assets of a taxpayer when both the taxpayer and the assets are beyond the jurisdiction of United States Courts (See Pt. I above). Further, its limiting language will not assuage the fears of the innocent or protect them from over-zealous tax collectors, and cannot cure, at this late date, the policy objections to the Government's position. Moreover, this belated indication of apparent self-restraint must be viewed with caution in light of the broad powers for which the Government seeks judicial sanction in this proceeding.

¹ "The U. S. Internal Revenue Service today announced that regulations will be issued limiting the authority of the Commissioner to take or authorize administrative or legal action to attach bank deposits payable at a foreign office of a bank doing business in the United States. Generally, the regulations will confine a levy enforcement or a tax lien foreclosure action on bank deposits of a person believed to be beyond the jurisdiction of a United States court to deposits payable at banking offices located in the United States, except where the Internal Revenue has reason to believe that funds have been transferred from the United States to hinder or delay collection of United States taxes.

"Internal Revenue Service said that the regulations will provide appropriate notice procedure so that a bank will easily recognize a levy or lien foreclosure proceeding intended to reach a deposit payable at a foreign office."

The Circuit Court refused to adopt a rule of law that would be repugnant to the principles of sound economic policy while gaining nothing in terms of tax administration. No other decision was possible.

III

The Decision Below Recognizes the Dangers to American Banks Inherent in the Government's Position.

Compliance with an order directing an American bank to freeze the deposit of a customer in an overseas branch or to transfer it to the United States would expose the bank to substantial, possibly even double, liability, since compliance would not excuse it, under the applicable foreign law, from liability to the depositor for the full amount of the deposit. Thus, in effect, if the Government's position were sustained, an American bank, which is not the taxpayer and is wholly innocent and in no way a party to any controversy between the Government and its depositor, might be compelled to pay, from its own resources, the tax alleged to be due.

The Government suggests (Petition, p. 18) that if the American bank were compelled by a foreign court to repay the depositor, it might have a constitutional right to recoup from the Government to the extent of its double payment. See *Cities Service Co. v. McGrath*, 342 U. S. 330, 335 (1952). But even if there is such a theoretical constitutional right, in order to claim it, the bank would have to refuse its depositor's demand, deny and litigate liability in a suit in a foreign court, with consequent legal expenses and damage to its community standing, and after losing, bring an action against the Government to recover the very amount which

the Government collected previously. The entire maneuver would be nothing more than an exercise in futility at the expense of the bank's reputation and corporate funds. Moreover, even the Government does not contend that legal expenses, or any penalties imposed by the foreign government for acts compelled by the American court, would be recoverable from the United States.

Citibank is not accused of being derelict in meeting its tax obligations. The Circuit Court properly recognized that the effect of acceding to the Government's position would be to subject the bank, a stranger to the tax controversy herein, to potential double liability. The impropriety of such a decision is made even more clear by recognition of the fact that it will not prevent the tax dodger from transferring his balances to any one of the many very substantial foreign banks or otherwise enhance the effectiveness of the Federal tax collection process to any degree.

Conclusion

As the decision of the Circuit Court is supported by unassailable authority, is entirely consistent with American foreign economic policies and reflects proper concern for the rights of innocent parties, the petition for a writ of certiorari should be denied.

May 13, 1964

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 998

UNITED STATES OF AMERICA, PETITIONER

v.

FIRST NATIONAL CITY BANK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. Respondent's brief in opposition reports that on May 8, 1964, it was advised by the delinquent taxpayer, Omar, S.A., that on May 7, 1964, six days before the filing of the brief in opposition, taxpayer transferred certain funds from respondent's Montevideo branch to its New York office (p. 5). The transferred amount, according to the taxpayer, is equivalent to its total deposits in respondent's foreign branches.¹

¹ If this transfer was a withdrawal of the sum on deposit in the branch at the time of the injunction, the taxpayer probably violated the injunction. See *United States v. Mine Workers*, 330 U.S. 258.

Respondent suggests that this development has rendered the 'case moot.' We disagree.

In the district court, one other financial institution, the Belgian-American Banking Corporation (Pet. 6, fn. 2), was exempted from the injunction with the consent of the United States when it submitted a sworn statement, which it permitted the Internal Revenue Service to verify, stating that it held no property of the taxpayer. Respondent, however, apparently remains unwilling to make such representations with respect to its foreign branches. Instead of giving facts of its own corporate knowledge, it submits a letter from taxpayer's Tax Court counsel which repeats what the taxpayer has stated to them. And taxpayer's counsel merely state that they have "reason to believe [that] the * * * statements are correct" (Br. in Opp. App. A).

Apart from the fact that they cannot be regarded as a satisfactory substitute for proof, the statements in the letter, on their face, plainly do not establish that the case is moot. The letter does not contain any information respecting agency or nominee accounts which the taxpayer may have, or may have had, in respondent's foreign branches. Furthermore, it does not state that the funds deposited

² If the case were in fact moot, the appropriate procedure would be for this Court to vacate the judgment of the court of appeals and to remand the case to the district court for the entry of an appropriate order; not, as respondent suggests, to deny certiorari. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39.

with respondent in New York on May 7, 1964, were withdrawn from the taxpayer's account in respondent's Montevideo branch, or that that account no longer exists. It may well be that the taxpayer made an additional deposit in Montevideo which was then transferred to New York. In that event, the original deposit remains intact and subject to the district court injunction. The fact that an additional amount has been deposited in New York is without legal significance. Such a new deposit in New York would simply be an addition to the funds of taxpayer previously discovered and secured in the United States; these funds fall far short of the amount necessary to satisfy the \$19,300,000 deficiency assessment.

2. After the filing of the petition for certiorari, the First Circuit decided *Equitable Life Assurance Society v. United States*, decided April 27, 1964 (64-1 U.S.T.C., par. 9433) in which it affirmed the district court's decision in *United States v. Brody*, 213 F. Supp. 905 (Mass.) (see Pet. 16, fn. 14). In *Equitable* the court basically followed the same reasoning as did the Fourth Circuit in *United States v. Metropolitan Life Insurance Co.*, 256 F. 2d 17 (Pet. 16-18). It held that the United States can maintain a *quasi in rem* action under 28 U.S.C., Section 1655, against a life insurance company to secure the insured's interest in policies even though the insured is outside the country and even though the insured could not himself secure the benefits of the policies without so electing and surrendering the policies. The First

Circuit's opinion is set forth as Appendix A to this reply brief.³

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

HAROLD C. WILKENFELD,
Attorney.

May 1964.

³Two other recent developments should also be noted. On May 1, 1964, the United States District Court for the Southern District of New York held that Section 302(a) of the New York Civil Practice Law and Rules (Pet. 10) was available to the United States in a tax collection action to effect service of process without the United States. *United States v. Montreal Trust Co.*, No. 60 Civ. 3028, Motion No. 45.

On April 10, 1964, the Court of Appeals for the Third Circuit vacated, on grounds not here relevant, the decisions of the district court in *United States v. Bankers' National Life Insurance Co.*, 198 F. Supp. 727 (N.J.) and *United States v. Wilson*, 195 F. Supp. 332 (N.J.) (Pet. 16, fn. 14); *United States v. Bankers National Life Insurance Co.* (C.A. 3d) (64-1 U.S.T.C., par. 9394); *United States v. Wilson* (C.A. 3d) (64-1 U.S.T.C., par. 9395) (other opinions of the Third Circuit in the *Wilson* case appear at 304 F. 2d 530, and 64-1 U.S.T.C., par. 9396). In *United States v. Sullivan* (C.A. 3d), decided April 10, 1964 (64-1 U.S.T.C., par. 9392), the Third Circuit expressly reserved the issue decided in *Metropolitan Life, supra*, and *Equitable, supra*.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE
STATES, DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA, PLAINTIFF, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

[213 F. Supp. 905]

Before WOODBURY, *Chief Judge*, and HARTIGAN
and ALDRICH, *Circuit Judges*.

OPINION OF THE COURT.

April 27, 1964.

ALDRICH, *Circuit Judge*. One Brody, a former resident of Massachusetts, having survived various personal difficulties with the government due to nonpayment of his income tax, *cf. Brody v. United States*, 1 Cir., 1957, 243 F. 2d 378, *cert. den.* 354 U.S. 923, disappeared, possibly to Switzerland. He is presumably still alive. He left behind, in addition to this outstanding obligation, two policies of life insurance on his life issued by appellant Equitable Life As-

insurance Society, the proceeds or value of which the government now seeks to reach, asserting a tax lien thereon under section 6321 of the Internal Revenue Code of 1954.¹ The policies, so far as appears, are in the hands of Brody's attorney in Florida who, not having Brody's permission, has declined to give them up. Equitable received the statutory notice of the tax lien in January 1959 and due demand for surrender of all "monies and property" subject thereto in May 1960, but refused any payment, including the accumulated dividends, no separate point of which is made on this appeal, because the policies had not been physically surrendered. This action to obtain payment under 26 U.S.C. § 7403,² was instituted in October 1961 against Equitable and Brody in the district court for the district of Massachusetts. Equitable, a New York corporation with its home office in New York, is doing business in Massachusetts. It is not claimed that Brody was domiciled in that

¹ "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

² Summarizing, subsection (a) "Filing," provides for an action in the district court "to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability." Subsection (b) "Parties," provides that all persons "claiming any interest" in the property shall be made parties. Subsection (c) "Adjudication and Decree," provides for an adjudication of all matters involved, and permits a sale of the property by decree of court and distribution in accordance with the interests of the parties. Subsection (d) "Receivership," permits the court to appoint a receiver with power, inter alia, to enforce the lien.

state, but his returns had been filed there, which may have suggested this selection. See 28 U.S.C. § 1396. Jurisdiction rests on 26 U.S.C. § 1340. Brody not being found within the state, and his address being unknown, service was made by publication in compliance with the terms of 28 U.S.C. § 1655, *infra*. No other person was named as a party, or, on the record, could have any interest in the policies.³

Policy No. 11,653,183 (hereinafter the '183 policy) was issued to Brody in April 1943 in the face amount of \$30,000 on the 15-year endowment plan. This meant that the policy totally "matured," viz., became payable to the endowment beneficiary, in April 1958. It would also have become payable on the insured's death had that occurred prior to the endowment maturity. The amount payable in either instance was the face amount, plus any accumulated dividends, less any outstanding indebtedness and interest thereon. If the policy matured as an endowment the payee was the insured, whereas in case of death it was a named beneficiary. The right to change the beneficiary was reserved, and in 1957 Brody designated the Internal Revenue Service as the (revocable) beneficiary. Prior to maturity the insured could, from among other policy rights, elect to surrender the policy, or to borrow against it up to the current "Loan and Surrender Value" pursuant to a table contained in the policy. This table recited the dollar amount of the cash surrender value for each policy

³ There could be no new beneficiary, nor any assignment which could affect the company, because the policies required any such change to be made in writing and filed at the home office. Cases cited by the company which have disregarded such provisions as between competing claimants for equitable reasons have not required a company that paid without notice of conflicting claims to pay twice.

year, and stated that the loan value was the same amount minus a prepaid interest deduction computed to the next anniversary date. The reason for the difference is that a loan leaves the policy in force, whereas surrendering it terminates the insurance. While the policy did not expressly say so, it has been held that ~~surrendering~~ the policy for its surrender value implies a physical delivery. *Kothe v. Phoenix Mut. Life Ins. Co.*, 1929, 269 Mass. 148. In connection with paying the matured amount the policy expressly provided for its "surrender." The policy was written on a single premium basis, which premium was paid when the policy was issued.

Policy No. 10,777,528 (hereinafter the '528 policy) in the face amount of \$1,000, was originally written in a different form, but in 1956 Brody converted it to an endowment policy maturing January 21, 1962, prepaying all premiums.⁴ The general policy provisions and circumstances, including the naming of the government as beneficiary, were otherwise similar to the '183 policy.⁵

⁴ It is arguable that any unearned prepaid amounts should be treated differently, with respect to the lien, from the amounts governed by the loan and cash surrender provisions of the policy. See Pyle, *Liability of Life Insurance and Annuities for Unpaid Income Taxes of Living Insureds, Annuitants, and Beneficiaries*, 9 Tax L. Rev. 205, 325, 337-38 (1954). However, the parties have not discussed this point and we need not pursue it.

⁵ Apparently dividends on this policy were to be applied to provide additional paid-up endowment insurance. No explicit disposition or even any mention of such amounts, if any, appears in the record. We do not decide to what extent, if at all, the government's lien might effectively proscribe the application of dividends to this use. See, generally, Pyle, *supra*, at 334-35, 340-42.

The foregoing facts appearing, the government moved for summary judgment. Equitable resisted on the ground that Brody was an indispensable party, ineffectively served by publication, and that in his absence it was not liable on the policies unless they were physically surrendered, from which it would follow that if it paid now it could be obligated to pay a second time. The court granted the government's motion and decreed that the liens were foreclosed. It ordered Equitable to pay the government the "cash value and proceeds * * * computed as of the day of payment," which, while perhaps not precise, served to designate amounts which the company admits it would have owed had Brody then surrendered the policies and demanded payment. It further decreed that upon such payment every obligation of Equitable with respect to the policies would be discharged as to all persons. In its accompanying opinion the court stated that Equitable's cases of *United States v. Massachusetts Mut. Life Ins. Co.*, 1 Cir. 1942, 127 F. 2d 880, hereinafter referred to simply as *Mass. Mutual*, and *United States v. Pennsylvania Mut. Life Ins. Co.*, 3 Cir., 1942, 130 F. 2d 495, had been "discredited" by *United States v. Bess*, 1958, 357 U.S. 51. Equitable appeals.

Equitable's first contention is that under *Mass. Mutual* the surrender of the policies was an absolute requirement, or condition precedent, to any liability. *Mass. Mutual* involved an unmatured policy, and we will defer discussing it until later.* The '183 policy

*The district court, and the parties, in speaking of the '528 policy treated it as unmatured, which it was at the date of the institution of suit. This was the correct approach, because unless the company's obligations constituted property within the district at that time there could be no basis for quasi in rem jurisdiction. *Crichton v. Wingfield*, 1922, 258 U.S. 66, see

had matured even before the government filed notice of lien, and was absolutely owing except for whatever effect was due the surrender requirement. Under these circumstances the special considerations which moved us in *Mass. Mutual* do not apply. The provisions for physical surrender of the policy in connection with obtaining the matured value is a mere house-keeping matter to permit the company to tidy up its affairs. As the district court pointed out, an insurance policy is not a negotiable instrument or specialty embodying the obligation. Cf. *Rosenthal v. Maletz*, 1948, 322 Mass. 586, 593. If the government was otherwise entitled to reach the obligation in this action the company could no more avoid this result by providing for the physical turning over of the policy than could a savings bank by a rule requiring delivery of the bank book. *United States v. Manufacturers Trust Co.*, 2 Cir., 1952, 198 F. 2d 366; *United States v. Bowery Sav. Bank*, 2 Cir., 1961, 297 F. 2d 380. This is not to voice disagreement with the principle that in matters of substance the government's lien cannot rise above the rights of the taxpayer. *United States v. Winnett*, 9 Cir., 1947, 165 F. 2d 149.

Considering, accordingly, the matured obligation represented by the '183 policy as absolutely owing to the insured, the question is whether it can be reached in this proceeding. The government says there is no problem. It concedes that the basic statute, section 7403, *supra*, fn. 2, made Brody an indispensable party,

Pennington v. Fourth National Bank, 1917, 243 U.S. 269. By amendment to the complaint, if filed and allowed by the court under F.R. Civ. P. 15(d), (and further publication) the government could have proceeded on the basis that this policy, also, had become fully matured, but no such amendment was filed. The parties apparently wish to treat this as a test case "of concern to . . . the entire insurance industry."

Macatee, Inc. v. United States, 5 Cir., 1954, 214 F. 2d 717; cf. *Shields v. Barrow*, 1854, 17 How. 130, 139; *State of Washington v. United States*, 9 Cir., 1936, 87 F. 2d 421, 427-28; F.R. Civ. P. 19, but asserts that he was adequately brought in for the purposes of quasi in rem jurisdiction by substituted service complying with the terms of 28 U.S.C. § 1655. The presently pertinent portions of this statute are the following.

“In an action in a district court to enforce any lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within the district, where any defendant cannot be served within the State, or does not voluntarily appear, the court may order the absent defendant to appear or plead by a day certain.

“If an absent defendant does not appear or plead within the time allowed, the court may proceed as if the absent defendant had been served with process within the State, but any adjudication shall, as regards the absent defendant without appearance, affect only the property which is the subject of the action. . . .”

The omitted portions are material in connection with the '528 policy, and will appear infra. The function of this statute, insofar as here relevant, is to give absent nonresident parties claiming an interest in property over which the court seeks to exercise jurisdiction due notice and opportunity to be heard, a fundamental condition not to jurisdiction, but to its assertion. *Cooper v. Reynolds*, 1870, 10 Wall. 308; *Granis v. Ordean*, 1914, 234 U.S. 385; *Pennington v. Fourth National Bank*, *supra*, at 272. Unless the

statute is to be read as wholly inapplicable to liens upon intangibles its use here seems peculiarly appropriate. Such liens are clearly given by section 6321 of the 1954 Code, *supra*, and are enforceable under 26 U.S.C. § 7403, *supra*, and there is no other statute which could be invoked where the defendant is outside the jurisdiction.

In the absence of any applicable constitutional limitations,⁷ we must give the phrase "personal property" in section 1655 the broad meaning necessary to effectuate the scope of these other provisions.⁸ It cannot be determinative that historically the principal use of this statute was in connection with liens upon tangible property. *Cf. Crichton v. Wingfield*, 1922, 258 U.S. 66; *Omaha National Bank v. Federal Reserve Bank*, 8 Cir., 1928, 26 F. 2d 884, 887-89; *United States v. Dallas National Bank*, 5 Cir., 1945, 152 F. 2d 582; see also Blume, *Actions Quasi in Rem Under Section 1655*, Title 28, U.S.C., 50 Mich. L. Rev. 1, 20-22 (1951). There are, of course, limits as to what constitutes intangible property, see, *e.g.*, *United States v. Long Island Drug Co.*, 2 Cir., 1940, 115 F. 2d 983, but in our opinion any chose of sufficient vitality to support a lien cognizable under section 7403 must equally qualify as property under section 1655; *United States*

⁷ There are none. *Cf. Chicago, R.I. & Pac. Ry. v. Sturm*, 1899, 174 U.S. 710; *Harris v. Balk*, 1905, 198 U.S. 215; *Biggart v. Straub*, 1906, 193 Mass. 77. Compare *Hanson v. Denckla*, 1957, 357 U.S. 235, 246-50.

⁸ There is a suggestion in *Equitable's* brief that there are further obstacles in that it "is not organized under the laws of Massachusetts nor is its principal office here." We could not accept the proposition that a debt or other incorporeal obligation on which the obligor can be sued elsewhere can be restricted for the purposes of section 1655 to the obligor's domicile. See fn. 7, *supra*; *cf. United States v. First National City Bank*, 2 Cir., 1963, 321 F. 2d 14.

v. *Metropolitan Life Ins. Co.*, 4 Cir., 1958, 256 F. 2d 17. While, admittedly, the property must be subject to the control of the court, *Chase v. Wetzler*, 1912, 225 U.S. 79; compare *Hanson v. Denckla*, 1958, 357 U.S. 235, 246-250, it can hardly be said that the statutory federal lien afforded the district court, upon obtaining in personam jurisdiction of the obligor, any less dominion and control over the property herein than that which was held sufficient to permit state courts to render the judgments examined in such cases as *Chicago, R.I. & Pac. Ry. v. Sturm*, 1899, 174 U.S. 710, *Harris v. Balk*, 1905, 198 U.S. 215, and *Biggert v. Straub*, 1906, 193 Mass. 77 (garnishment) or *Pennington v. Fourth National Bank*, *supra*, and *Bragg v. Gaynor*, 1893, 85 Wis. 468 (injunction). But compare *Andrews, Situs of Intangibles in Suits Against Nonresident Claimants*, 49 Yale L.J. 241, 248-53, 254-61 (1939) (conflicting claim cases).

Special questions arise with respect to the '528 policy. In *United States v. Massachusetts Mut. Life Ins. Co.*, (*Mass. Mutual*), *supra*, the defendant insurance company refused to recognize a notice of levy and distraint whereby the government sought to obtain the cash surrender value of an unmaturred policy on the life of a defaulting taxpayer.* The government thereupon brought an action under section 3710(b) of the Internal Revenue Code of 1939 (now I.R.C. (1954) § 6332(b)) for a "penalty" measured by the value of the "property, or rights to property, subject to distraint . . ." wrongfully withheld. The defense was that the policy had not been surrendered by the insured. We held for the company. In an opinion carefully analyzing the mutual rights and obligations

* See I.R.C. (1939) §§ 3670-72, 3690, 3692, 3710(a), now I.R.C. (1954) §§ 6321-23, 6331(a), (b), 6334(c), 6332(a).

of the parties under a policy of life insurance we stated, 127 F. 2d at 883, that since "the insured has made no application for the cash surrender value and has not surrendered the policy . . . the insurance company does not now owe the insured the cash surrender value." Or, as the court said in *United States v. Manufacturers Trust Co.*, *supra*, at 368, "the insurance company did not owe [the surrender value] . . . to the insured unless, and until, the insured elected to receive it by relinquishing his other rights under the policy." This was not to say that the government did not have a lien against the contract. The reverse was there assumed. But where a contract calls for alternative performances, at the obligee's choice, until the obligee chooses the obligor owes neither. See 1 Williston, Contracts, § 44 at 148 n.15 (3d ed. Jaeger 1957); 5 Corbin, Contracts, § 1079 at 383-84 (1951); Restatement, Contracts, § 325 (comment a) (1932). In fact a selection of the cash surrender value is more than an ordinary election between two alternative rights. The insurance obligation was already operative. The company would remain liable for that obligation unless some positive action, binding on the insured, could affirmatively terminate it and substitute the alternative promise which, at least until the contract has finally matured, is clearly "inconsistent."¹⁰ (*United States v. Behrens*, 2 Cir., 1956, 230

¹⁰ The amount of real insurance at any moment during the life of the policy is the difference between the cash surrender value and the face amount. An election to take the cash value prior to maturity is a discharge of the insurance feature of the contract. We cannot agree with the oft-quoted statement in *In re McKinney*, D.C.S.D.N.Y., 1883, 15 Fed. 535, 537, that the surrender value "constitutes . . . [an] advance to make up the deficiency in later premiums . . . the 'net reserve' required by law to be kept by the company for the benefit of the assured. . . ." Actually the surrender value is less than the reserve which must be maintained against the

F. 2d 504, 506, *cert. den.* 351 U.S. 919). Consequently, as the court correctly pointed out in *United States v. Pennsylvania Mut. Life Ins. Co.*, 3 Cir., 1942, 130 F. 2d 495, the payment of a "penalty" by the company to the government on the theory that this selection had been accomplished by the levy must leave the company still subject to the primary obligation unless one were to say, which, correctly, the court could not, that the ex parte levy could bind the insured, the one who "possessed" (*United States v. Bess*, 357 U.S. 51, 56 *infra*) the right to elect it. This was not a taking of money in the bank.

In other words, what we held in *Mass. Mutual* was that the government, by merely filing a notice of lien, or by an ex parte attempt to obtain the surrender value by levy, could not exercise the insured's election for him and make the company's obligation to pay mature as a debt in "possession."¹¹ Not presently

policy. See Maclean, *Life Insurance* 181 (8 ed. 1957). Moreover, it represents matters in addition to an advance for payment for future premiums, or it would ultimately decrease as the policy approaches maturity. The fact is, as is illustrated by the within policies and, as we might judicially notice, ordinary life and endowment policies generally, it continuously increases. Returning to the matter of "inconsistency," it seems clear that upon death the inconsistency between the cash value and the insurance feature of the contract disappears. The company then owes the beneficiary the cash value plus the amount of the true insurance. Consequently, if we may be permitted to say so, as a matter of analysis we would wholly agree with the court in *United States v. Bess*, 1958, 357 U.S. 51, *infra*, that the property of the insured which passes to the beneficiary on death is the surrender value.

¹¹ Section 3710 of the 1939 Code then under consideration read "in possession of property . . ." whereas present section 6332 reads "in possession of (or obligated with respect to) property . . ." This does not change the concept of a present obligation.

owing the surrender value, it was not "in possession of property . . . subject to distraint" in the sense that it could incur the section 3710(b) penalty for failure to respond."

There were sound practical reasons for this. The surrender value of a life insurance policy is related to the normal life expectancy of the insured, usually as of the date the policy was purchased. It constitutes the minimum worth of the policy. As we pointed out in *Mass. Mutual* an insured may be in various degrees of health and have but a short expectancy, making the actual value of his policy much greater. For poor health, or other reasons, he may be not reinsurable at any cost. The government failed in that case precisely for the reason that it could be permitted neither to exercise the insured's election to surrender the policy" and cut off other

"It would unnecessarily prolong this opinion to consider to what extent the government could subject rights in insurance policies to distraint and sale. As the court said in *United States v. Stock Yards Bank*, 6 Cir., 1956, 231 F. 2d 628, at 631, distraint is a "blunt instrument" of sometimes doubtful propriety. For reasons at least indirectly indicated *infra*, its use in this field may be questionable. For present purposes we point out that if there is a levy and sale, as distinguished from the even blunter assertion of a penalty attempted in *Mass. Mutual*, the owner of the policy must be given notice. 26 U.S.C. § 6335(b).

"It is important to note that we were there, and are here, talking in terms of contractual rights, and surrendering the policy in a contractual sense as distinguished from mere physical delivery. If Brody's Florida attorney, for example, had complaisantly turned over these policies without authority it would in our view have affected the present case in no particular. Equitable, and companies in other cases, do themselves a disservice, in the sense of beclouding the issues, when they talk in terms of physical surrender.

rights in a procedure which did not afford him and other interested parties the opportunity to protect their interests in the manner provided herein under section 7403 and by section 1655, nor to expose the insurance company to multiple liability, *United States v. Pennsylvania Mut. Life Ins. Co., supra*.

Nor does *United States v. Bess*, 1958, 357 U.S. 51, dictate a contrary result. In *Bess* a delinquent taxpayer died leaving policies of life insurance payable to his widow as beneficiary. Prior to his death the government had filed a notice of lien with the insurance company, but had taken no other action. The total cash surrender values immediately prior to death were relatively small; considerably less than the tax indebtedness, whereas the net proceeds payable to the beneficiary at death were substantially larger. The government attempted to collect the entire tax from the widow. The court held that pursuant to section 3670 (now I.R.C. (1954) § 6321) the government had a lien upon "all property and rights to property" of the insured, but restricted the government's recovery to the amount of the surrender values as of the time of death. While it is true that the court stated, 357 U.S. at 59, that the "surplus of the paid premiums accumulated to make up the cash surrender value" should be treated for some purposes as though in fact a 'fund' held by the insurer . . ." this was very carefully not saying it was a fund. It was not a holding that the surrender value was an open debt, and particularly it

¹⁴ With the greatest deference, a not strictly accurate characterization. See fn. 10, *supra*. The surrender value also represents what might be termed a savings factor.

was not a holding that this value became payable to the government upon its demand."

Although the district court's opinion that the *Mass. Mutual* line of decisions has been discredited was unwarranted, nonetheless Equitable's position is not advanced. In the present case the government does not seek to proceed summarily against the company, but has brought a plenary action joining the insured. Had there been personal service on the insured within the jurisdiction no one would question the court's right to reach the policy. *United States v. Bess*, *supra* at 57 n. 3; *United States v. Fried*, 2 Cir., 1962, 309 F. 2d 851. Since the unmaturing contract was sufficient to support a lien the government may equally proceed under section 1655. The insured is afforded the opportunity to protect his interests, and by the same token the company is protected against double liability. This right in the insured is far from a theoretical one. As we have pointed out, for example, because of an insured's poor health a policy may have a substantial worth beyond its cash

¹⁰ In *Bess* the policy had matured. Moreover, all parties were before the court. Our decision conflicts with neither the holding, the language, nor the reasoning. The district court's view, on the other hand, that *Mass. Mutual*, which was nowhere mentioned, was discredited by *Bess* leads to peculiar difficulties. In *United States v. Salerno*, D.C.D. Nev., 1963, 222 F. Supp. 664, the court, relying on the opinion below, held that the government's notice of levy and demand upon the insurance company for payment found the company with the surrender value in its "possession" to the extent that it became liable to account to the government, and assessed a penalty in the equivalent amount for not paying it over. At the same time the court held that the insurance contract continued in force. It so happened that the insured did not die, or the court might have had more forcefully impressed upon it the inconsistency of holding the company simultaneously on two alternative promises.

surrender value. A sale of the policy may be more advantageous than its surrender. Or arranging for a policy loan in the government's behalf might be sufficient to meet the tax indebtedness.¹⁸ That the court has scope in affording the insured relief see *Schwarz v. United States*, 4 Cir., 1951, 191 F. 2d 618.

If the insured is served only by publication, as in the case at bar, there may be an additional problem not recognized by the court in *United States v. Metropolitan Life Ins. Co.*, *supra*, and not adverted to by the parties here. We mention it, however, lest our decision be too broadly construed. Section 1655 provides that when any defendant cannot be served within the state, or does not voluntarily appear, an order to appear

“... shall be served on the absent defendant personally if practicable, wherever found. . . . Where personal service is not practicable, the order shall be published as the court may direct, not less than once a week for six consecutive weeks.

“Any defendant not so personally notified may, at any time within one year after final judgment, enter his appearance, and thereupon the court shall set aside the judgment and permit such defendant to plead on payment of such costs as the court deems just.”

This means that an absent defendant who fails to appear and who was not personally served, even though the publication was made can as of right have

¹⁸ A policy “loan” is not, of course, a true loan as there is no obligation to repay. *Board of Assessors v. New York Life Ins. Co.*, 1910, 216 U.S. 517.

the judgment vacated within the year." *Perez v. Fernandez*, 1911, 220 U.S. 224.¹⁸ The right to have the judgment set aside raises no problem where the intangible property on which the government has foreclosed was a simple debt. If the foreclosure was erroneously effected the defendant-claimant, on his learning of it within the year, will merely find that his interest has changed hands, but has not changed in character. If, however, his policy of life insurance has been surrendered, this is a most material change. If the policy cannot be ordered reinstated, a defendant may have suffered irretrievable injury. On the other hand, if the insurance company, an innocent third party, can be compelled to reinstate the contract, there is an obvious danger of "selection," to use an insurance term, against it. The most likely case where reinstatement will be requested, even, perhaps, by collusion between the other parties, will be where the insured-against loss has occurred. In other words, to foreclose a policy outright where there is an outstanding right to have the judgment vacated.¹⁹

¹⁸ It is perhaps unnecessary to point out that the reopening protection thus afforded, on the theory that foreclosure of the lien would itself tend to result in actual notice, is particularly important where the property foreclosed is a chose in action and the suit may be brought, and the newspaper publication made, in a state where the absent defendant has no other connections. However, it is this very protection that, from the standpoint of due process, makes it fair to apply section 1655 as broadly as we do.

¹⁸ *Perez v. Fernandez* was decided under a statute which read "actually personally notified" rather than "personally notified." Act of March 3, 1875, c. 137, § 8, 18 Stat. 472. We have no reason to believe, however, that a substantive change was intended by the present codification.

¹⁹ We are not, of course, speaking about equitable relief under F.R. Civ. P. 60.

leaves open an avenue of unfairness in one direction or another.

In these circumstances in the ordinary case where the insured or other parties having possible interests in the policy are not personally served and fail to appear, we might feel it inappropriate to foreclose on the contract to the extent of taking the surrender value directly and terminating the contract. Different considerations apply to enforcing the lien against the loan value. In such a case such maximum loan might be taken as would permit an arrangement under the flexible powers given to the court by section 7403, to continue the policy in force for the year available to reopen the judgment. Such questions, however, need not concern us here, for the '528 policy matured as a simple debt prior to the decree. The decree, appropriately, spoke as of the date of its entry.²⁰ For the government to be awarded all of the net proceeds would accordingly effect no damaging change of position nor prevent the restoration of the status quo if Brody should hereafter exercise his right to have the judgment set aside.

*Judgment will be entered affirming the judgment of the District Court.*²¹

²⁰ The government's lien had attached to the entire bundle of Brody's property rights in the contract, including his right to receive the endowment proceeds. It was this right, which had ripened and bore fruit at the time foreclosure was decreed, that the government collected upon. *Cf. United States v. Bess, supra* (Government obtains surrender value at death, not value when lien attached); *United States v. Dallas National Bank*, 5 Cir., 1947, 164 F. 2d 489.

²¹ After this opinion was settled we received copies of the Third Circuit opinions in *United States v. Sullivan* and *United States v. Wilson*, 4/10/64. Examination thereof does not appear to call for any further elaboration on our part in the light of our essentially consistent result.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 59

UNITED STATES OF AMERICA, PETITIONER

v.

FIRST NATIONAL CITY BANK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 26-29) is reported at 210 F. Supp. 773. The opinions of the panel of the court of appeals (R. 35-52) are reported at 321 F. 2d 14. The opinion of the court of appeals, sitting *en banc* (R. 68-69), is reported at 325 F. 2d 1020.

JURISDICTION

The judgment of the court of appeals, sitting *en banc*, was entered on January 13, 1964 (R. 70). The petition for a writ of certiorari was granted on June 1, 1964. 377 U.S. 951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, prior to service of process on the taxpayer in an action to collect taxes, the district court has the power to issue an injunction *pendente lite* prohibiting third parties within the jurisdiction from disposing of the taxpayer's property, even though such property is represented by a deposit payable outside the jurisdiction.

2. Whether a taxpayer's bank deposit in a foreign branch of a New York bank, collectible in New York if payment is refused at the branch, is subject to tax lien foreclosure in the district of the home office.

STATUTES AND REGULATIONS INVOLVED

Sections 6321, 7402(a) and 7403(a) of the Internal Revenue Code of 1954, Section 1655 of 28 U.S.C., Sections 302 and 313 of the New York Civil Practice Law and Rules, and Sections 301.6332-1(a) and 301.7401-1 of Treasury Regulations on Procedure and Administration (1954 Code), are set forth in the Appendix, pp. 38-43, *infra*.

STATEMENT

Omar, S.A., is a Uruguayan corporation (R. 3). On October 31, 1962, the Commissioner of Internal Revenue made jeopardy assessments against Omar, totalling approximately \$19,300,000. The assessments were on account of corporate income tax liabilities, plus interest and penalties, found to have been incurred but unpaid with respect to income realized by Omar from sources within the United States, during its fiscal years March 31, 1955, through March

31, 1961 (R.4-6).¹ On the same day, the First National City Bank (respondent) was served with notice of levy and notice of the federal tax lien (R. 23).

Concurrently, the United States commenced an action in the United States District Court for the Southern District of New York naming, as defendants, Omar, S.A., Lazard Freres and Company, Lehman Brothers, Belgian-American Banking Corp., Belgian-American Bank & Trust Company, First National City Trust Company, and respondent (R. 3-4). The complaint alleged, *inter alia*, that respondent held "substantial sums of money for, for the account, or to the credit of, Omar * * *" (R. 7). Personal jurisdiction over respondent was acquired by service of process² (R. 2, 28), but Omar has not yet been served.

The complaint requested that the district court determine that Omar was indebted to the United States for taxes, interest and penalties in the amount of the assessment; that the court foreclose the tax lien of the United States upon all of Omar's property and rights to property, including sums held for the account or credit of Omar in foreign branch offices of the defendant banks; and that it grant such "further relief that it deems is just, equitable and

¹ Omar failed to pay these assessments (R. 4-6). On May 20, 1963, Omar petitioned the Tax Court for a redetermination of these deficiencies. Docket No. 2041-63. No decision has been rendered in that proceeding. Since a jeopardy assessment is involved here, collection is authorized despite the pendency of Tax Court proceedings. See Section 6213(a), Internal Revenue Code of 1954.

proper." The complaint also requested that, pending the determination of the action, the court enjoin the defendants from transferring any property or rights to property held for the account of Omar (R. 7-8).

Affidavits by several internal revenue agents were filed in support of the application for injunctive relief. They show the following facts:

The possible tax delinquency first came to the attention of the Internal Revenue Service in 1959, when Omar filed its first and only tax return, which claimed a refund of tax previously withheld at the source (R. 13, 16). Because the return was incomplete, additional information concerning the corporation was requested (R. 13-16). The internal revenue agent conducting the examination also informed Omar that he proposed to make a determination of Omar's tax liability on the basis of information at hand (R. 13-14).

The Service later learned that in June 1961 a director of Omar came to the United States and commenced to liquidate Omar's assets in the United States (R. 14). The records of Lehman Brothers, a brokerage house of which Omar was a customer, disclose that in December 1961, Omar withdrew \$500,000 from its account there. A notation opposite the withdrawal states: "Check to 1st National City Bank" (R. 19). The records of Lazard Freres & Company, another brokerage house which held securities for Omar, reveal that in the same month \$1,640,000 was paid to Omar with the notation: "Transfer by wire to 1st National City Bank of n y [sic] Montevideo credit for your acct" (R. 18). In the same year \$400,000

was transferred from Omar's Lazard Freres account to the Montevideo branch of the Belgian-American Banking Corporation (another of the original defendants) for the account of Omar (R. 17), and \$800,000 was transferred from Omar's account with Abraham & Company, another New York brokerage house, to the same Montevideo account (R. 18). There was other evidence that Omar was removing its assets from the United States (R. 14-16).

On October 31, 1962, the district court, per Dawson, J., issued a temporary restraining order (R. 9-10, 26) and, after a hearing, filed an opinion (R. 26-29) which found in part (R. 27):

The affidavits of the plaintiff show an intent to liquidate, and in fact, substantial liquidations of the defendant Omar's accounts within the United States and transfer of the proceeds outside of the territorial jurisdiction have occurred. It therefore appears that there is a clear and present danger that plaintiff may be unable to recover upon defendant Omar's tax liability.

Accordingly, on the basis of its "personal jurisdiction over the officers of the bank within the United States" (R. 28), the district court concluded that it should exercise its "equitable power to issue a preliminary injunction so as to prevent irreparable injury pending the determination of an action" (R. 27).² It thereupon ordered (R. 31):

² The district court excluded First National City Trust Company and Belgian-American Bank & Trust Company from the injunction, on the basis of a satisfactory showing that neither they nor their branches or agents held any of Omar's assets (R. 21-22, 25, 28-29). Respondent, in opposing the motion for a preliminary injunction, filed an affidavit by one of its vice-

that pending the determination of this action or until further order of this Court, the defendants, * * * First National City Bank of New York * * * be and they are hereby restrained from selling, transferring, pledging, encumbering, disposing of, or distributing any property or rights to property of Omar, S.A., * * * now held for or for the account of the said Omar, S.A., by them or by any of their branches, agents, or nominees whether located within the United States or not and whether their branches, agents, or nominees are located within the United States or not.

The court's opinion observed that if compliance with the injunction were shown to violate foreign law, the injunction would be modified (R. 28).

Respondent forthwith appealed from the issuance of the preliminary injunction (R. 32). A three-judge panel of the court of appeals voted to reverse the district court, Circuit Judge Hays dissenting (R. 35-52). The majority reasoned that since the district court did not yet have personal jurisdiction over Omar, it could proceed only with reference to such of Omar's property as was located within its jurisdiction (R. 40, 47). The court concluded that deposits held by respondent which were "collectible [by Omar] only outside the United States" (R. 49) were

presidents which affirmatively stated that Omar was not a depositor of the bank at its head office or any domestic branch, but neither affirmed nor denied that Omar was a depositor at any of the bank's foreign branches (R. 23-24). The location and other details of Omar's foreign branch accounts, if they exist, now await further clarification in the district court, pending disposition by this Court of this proceeding.

not property within the jurisdiction of the district court. This followed, said the court, because the rights of the United States, by virtue of its tax lien, were no greater than Omar's rights, and Omar could not have brought suit in New York to collect deposits payable abroad unless it had demanded and been refused payment at the counters of the foreign branch (R. 40-46). On rehearing *en banc*, the court of appeals reversed the district court by a vote of 4-to-3 (R. 68-69).³ The court of appeals stayed its mandate pending filing of the petition for certiorari. The petition was granted on June 1, 1964 (377 U.S. 951).

Since the decision below, the Treasury has promulgated regulations limiting the Commissioner's authority to levy on deposits in foreign branches of banks doing business in the United States (see Appendix, pp. 41-43, *infra*).

INTRODUCTION AND SUMMARY OF ARGUMENT

Because of the serious effect which the decision of the court of appeals would have upon efforts to collect delinquent taxes from nonresident alien taxpayers deriving income from United States sources (as well as from American citizens residing abroad), the United States petitioned in this case for a writ of certiorari. As we pointed out in the petition (pp. 7-8), such persons "not infrequently frustrate col-

³ Judge Kaufman did not participate in the rehearing. Judge Clark died after argument but before announcement of the decision. It was noted that he had indicated his intention to vote for affirmance of the district court. An equal division would have resulted in affirmance. *Farrand Optical Co. v. United States*, 317 F. 2d 875, 885-886 (C.A. 2).

lection of the taxes which they have incurred by liquidating their American assets and transferring the proceeds to foreign branches" of domestic financial institutions. The injunction here under review would freeze such funds before they are paid to the taxpayer abroad so as to make them available for payment of delinquent taxes.

1. We contend, first, that the district court's order enjoining respondent "from selling, transferring, pledging, encumbering, disposing of, or distributing any property or rights to property of Omar, S.A. * * * now held for or for the account of the said Omar, S.A., by [respondent] or by any of [its] branches, agents, or nominees whether located within the United States or not * * *" (R. 31) was a proper *in personam* order to a party over whom personal jurisdiction had been obtained, irrespective of the "situs" of respondent's obligation to Omar. The claim, in brief, is that the district court had discretion to grant temporary relief in order to preserve the Uruguayan account⁴ while the government was seeking to obtain personal jurisdiction over Omar and compel the latter to make the funds available for payment of its tax obligation. The power of a district court to act *pendente lite* in this

⁴ Although respondent's brief in opposition indicates, on the basis of a letter from taxpayer's counsel, that taxpayer's only account is at Montevideo (Br. in Op., p. 5), the extent and whereabouts of deposits with respondent payable directly or beneficially to Omar is a proper subject of proof in the district court. Litigation of this fact question in a plenary proceeding has so far been precluded by respondent's appeal from the temporary injunction.

manner derives from established principles of equity as well as from Section 7402 of the Internal Revenue Code of 1954. Neither the circumstance that Omar, the principal defendant, has not yet been served, nor the fact that respondent's debt to the taxpayer is payable, in the first instance, in Montevideo, affects the jurisdiction of the district court. Service on Omar can be made under a recent provision of the New York Civil Practice Law and Rules, and temporary relief is warranted until such service can be obtained. And since respondent has actual control over its Montevideo branch—which is an arm of respondent's single federally chartered corporation—New York's "separate entity" doctrine does not prevent the issuance of the injunction. Nor is there any policy reason to deny relief. No severe hardship is imposed on the bank nor is it made less attractive to potential depositors if such limited relief is granted in a narrowly defined group of cases.

2. Alternatively, we contend that the court of appeals erred in concluding that the New York "separate entity" concept of branch banking fixed the situs of respondent's obligation to Omar in Montevideo for federal tax-collection purposes. We submit that for these purposes the obligation to Omar has its situs at respondent's main office. Under the statute governing venue in tax lien foreclosure actions, the debt constitutes property "within the district" even though it is payable, in the first instance, in Montevideo. The local "separate entity" principle is inapplicable in a federal tax lien foreclosure action such as this one because this taxpayer actually has

the power to make the funds payable within the United States and should not, merely by its refusal to exercise this power, be able to frustrate the collection of a lawful obligation.

3. No policy reasons stand in the way of the enforcement of an appropriate order such as the one issued by the district court. The threat of multiple liability is insubstantial and premature; the bank's claim of hardship is unreal and, on closer analysis, totally without substance. This is particularly true in light of the recent Treasury Regulation which limits the power of the Commissioner to employ administrative sanctions or to apply for injunctive relief with respect to deposits in foreign branches to the case where the taxpayer is already subject to United States jurisdiction or has transferred a deposit from the United States to a foreign branch to hinder or defeat collection of federal taxes.

ARGUMENT

I

THE DISTRICT COURT HAD AUTHORITY TO ENJOIN RESPONDENT, OVER WHOM IT HAD PERSONAL JURISDICTION, FROM PARTICIPATING IN THE DISSIPATION OF ASSETS BELONGING TO AN ABSENT TAXPAYER PENDING THE SERVICE OF VALID PROCESS UPON THE TAXPAYER

Our first contention assumes for purposes of argument that respondent's debt to Omar,⁸ evidenced by a deposit originating in respondent's United States

⁸ Cf. Lamb, *Group Banking*, p. 46: "Deposits are received in all areas served by the branches and these combined liabilities become the debt of the parent institution."

main office, and now carried on the books of its Montevideo branch and payable there in the first instance, does not have a situs within the United States. Accepting this proposition, *arguendo*, it may be that no action *quasi in rem* could be maintained in the Southern District of New York with respect to this debt. This would not, however, leave the government without a remedy. If personal jurisdiction were obtained over Omar, that corporation could be ordered to transfer the funds on deposit in Montevideo to the government. *United States v. Ross*, 302 F. 2d 831 (C.A. 2); see *Massie v. Watts*, 6 Cranch 148; *Phelps v. McDonald*, 99 U.S. 298, 307-308.* Consequently, even on the above hypothesis, this Court should approve the action of the district court in entering a temporary injunction against respondent—a party over whom it had personal jurisdiction—whereby respondent was directed to preserve the very fund which could be transferred to the United States by court order if and when personal jurisdiction were obtained over Omar. We stress that this injunction was not equivalent to garnish-

* This order can be made effective without imposing sanctions for contempt. The district court, acting under Rule 70 of the Federal Rules of Civil Procedure, could order a person appointed by the court to transfer the right to the deposits to the United States. The United States could then demand payment abroad, and, if payment were refused, could collect by suit in the United States. See *Sokoloff v. National City Bank*, 130 Misc. 66, 224 N.Y.S. 102, affirmed, 223 App. Div. 754, 227 N.Y.S. 907, affirmed, 250 N.Y. 69, 164 N.E. 745; cf. *Corbett v. Nutt*, 10 Wall. 464; *Watkins v. Holman*, 16 Pet. 25; *Roller v. Murray*, 234 U.S. 738.

ment, seizure, or attachment. It was merely an order preserving an asset which a named defendant—not yet before the court—might be compelled by court decree to transfer to the United States. The validity of such an order is supported by the terms of the governing statute and by traditional principles of equity. The court's power to enter it was not affected by the circumstances that Omar—against whom the order did not run—had not been served, and that the deposit was, under New York law, payable in the first instance outside the United States. The validity of the order did not turn, as the court of appeals erroneously believed, on “whether [respondent] holds property or rights to property of the taxpayer Omar subject to the jurisdiction of the district court” (R. 39). For the district court's jurisdiction to enter the order depended not on the situs of the debt but on respondent's presence before the court.

A. THE TEMPORARY INJUNCTION WAS AUTHORIZED BY STATUTE AND BY ESTABLISHED PRINCIPLES OF EQUITY

Section 7402(a) of the Internal Revenue Code of 1954 (p. 38, *infra*) provides as follows:

The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction * * * as may be necessary or appropriate for the enforcement of the internal revenue laws. * * *

The order entered by the district court in this case was patently “necessary or appropriate for the enforcement of the internal revenue laws.” According to the affidavits before the court (R. 13-20), Omar

had embarked on a calculated program to frustrate the enforcement of the tax laws by removing its assets from the United States. This collection action was instituted pursuant to jeopardy assessments in order to reach, *inter alia*, the very funds which Omar had transferred to its account at respondent's Montevideo branch. If a temporary injunction of the sort involved here could not be issued, the funds payable in Montevideo might well be dissipated by the time service on Omar could be obtained. Hence the order was both "necessary" and "appropriate" for the effective enforcement of the internal revenue laws against Omar.

In addition, the order was consistent with established equity practice. It has long been settled that equity will act "to preserve the property from destruction pending legal proceedings for the determination of the title." *Erhardt v. Boaro*, 113 U.S. 537, 539. Although the classic application of this doctrine is in real property cases, when equitable relief is sought to maintain the status quo while the legal issue of title is being litigated, the principle is fully applicable to other disputes, including tax collection cases such as this one.

In *Deckert v. Independence Shares Corp.*, 311 U.S. 282, a bill in equity was brought against an insolvent and allegedly fraudulent vendor of securities and against a third party possessing assets belonging to the vendor. By way of interlocutory relief, plaintiffs sought the appointment of a receiver to administer the assets of the vendor and an injunction against the vendor's debtor. This Court sustained the issu-

ance of a preliminary injunction restraining the vendor's debtor from transferring or disposing of any of the assets owing to the vendor, in order that the plaintiff's remedy might not be frustrated. It said that "the injunction was a reasonable measure to preserve the status quo pending final determination of the questions raised by the bill." 311 U.S. at 290.

In *DeBeers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, a temporary injunction was issued restraining nine foreign corporations, defendants in an antitrust action, from withdrawing any of their property from the United States pending the outcome of the litigation. The corporations challenged the court's jurisdiction over them and also attacked the injunction. This Court reversed the district court's order because no money judgment could have been entered in the antitrust suit; hence it concluded that the temporary injunction "deals with property which in no circumstances can be dealt with in any final injunction that may be entered." 325 U.S. at 220. In reaching this conclusion, the Court distinguished the *Deckert* case because it dealt with an injunction "with respect to a fund or property which would have been the subject of the provisions of any final decree in the cause." *Ibid.* In this regard the present case is analogous to *Deckert* and unlike *DeBeers*. If and when personal jurisdiction is obtained over Omar and the government prevails, the very funds which are "frozen" by the temporary injunction will be ordered transferred to the government. Consequently, the injunction in this case clearly deals with the same

property that may be affected by the final judgment.'

The present situation is admittedly different from that in *Deckert*, in two respects. First, in *Deckert* the primary obligor—i.e., the party against whom the plaintiffs were seeking judgment—had been subjected to the jurisdiction of the court; in the present case Omar has not yet been served. Second, in *Deckert* there was no question as to the court's jurisdiction over the principal defendant's debtor; in the present case it could be contended that under New York's "separate entity" doctrine Omar's only debtor is respondent's Montevideo branch—an "entity" over which the court might be said to have no jurisdiction. We submit, for reasons stated below, that neither of these considerations warrants a different result in this case from that reached in *Deckert*.

B. THE INJUNCTION COULD ISSUE AGAINST RESPONDENT OVER WHOM THE COURT HAD PERSONAL JURISDICTION, NOTWITHSTANDING THE TAXPAYER'S ABSENCE

The fact that Omar has not yet been served is of no consequence in determining whether the injunction

¹ In *United States v. Morris & Essex R. Co.*, 135 F. 2d 711 (C.A. 2), certiorari denied, 320 U.S. 754, a temporary injunction restraining payment by a delinquent taxpayer's debtor to the taxpayer's shareholders was sustained. The Second Circuit, per Judge Learned Hand, first determined that the shareholders and the taxpayer were to be considered one and the same. It then satisfied itself that if certain steps were taken by the government, the tax debt could be collected from the money owed by the taxpayer's debtor. It concluded: "The path being therefore cleared for an action by the plaintiff as substitute obligee of the lessor's [taxpayer's] right of action against the lessee [debtor], the tax can be recovered in full, and to that end the asset must be preserved meanwhile." 135 F. 2d at 713-714. (Emphasis added.)

issued against respondent is valid. This action commenced with the filing of a complaint, Rule 3, Federal Rules of Civil Procedure, and it "remains pending until dismissed by the court under Rule 41(b) for lack of due diligence in prosecution." *Hackner v. Guaranty Trust Co. of New York*, 117 F. 2d 95, 99 (C.A. 2). In the interim, whether or not the principal defendant has been lawfully served, the district court has the power to preserve the status quo by issuing orders to other parties over whom it has jurisdiction. Respondent was named as a party and was duly served. It is subject to the court's jurisdiction and amenable to its orders.

The power to issue a temporary injunction against a party such as respondent pending service of process on the principal defendant is certainly no less than the court's power in an *in personam* proceeding to order attachment or garnishment of the assets of a defendant who has not yet been served. Prior to the recent amendments of the Federal Rules of Civil Procedure (see the amended Rule 4(e)), a federal district court could not obtain *quasi in rem* jurisdiction over a debt owed to an absent defendant even though the debtor was subject to the court's jurisdiction. *Big Vein Coal Co. v. Read*, 229 U.S. 31. Nonetheless, if a suit were instituted against a defendant over whom personal jurisdiction *could* be obtained within the district, writs of attachment or garnishment could issue to the defendant's debtors pending service of process on the defendant. *Jacobson v.*

Coon, 165 F. 2d 565 (C.A. 6); *Hearst v. Hearst*, 15 F.R.D. 258 (N.D. Cal.); but see *Interstate Cigar Co. v. Corral Wodiska y CA*, 30 F.R.D. 354 (E.D. N.Y.). So long as "it appears that jurisdiction in personam may be secured in due course" it has been held appropriate to grant such interlocutory relief as might be necessary "to secure the prospective judgment prior to the time that the defendant is personally served." *Hearst v. Hearst*, *supra*, at 260; see also *Georgia v. Brailsford*, 2 Dall. 402.*

Service of process on Omar "in due course" is highly probable. Under the recently enacted Section 302(a) of the New York Civil Practice Law and Rules, Omar may be subjected to the jurisdiction of the court with respect to "a cause of action arising from * * * any business [transacted] within the state" (p. 40, *infra*). Service of process may then be made outside the State under Section 313 of the New York Civil Practice Law and Rules, which allows service on the absent defendant by any person

* The fact that the order affects the rights of the yet-absent defendant by "freezing" its deposits in Montevideo is no bar to relief. In *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, this Court sustained the district court's power to transfer an action to another district under 28 U.S.C. 1406(a) even though service over defendants could not be had in the transferor district. See *United States v. Berkowitz*, 328 F. 2d 358 (C.A. 3), certiorari pending, No. 125, 1964 Term; *Koehring Co. v. Hyde Construction Co.*, 324 F. 2d 295 (C.A. 5) (transfer under 28 U.S.C. 1404(a) sustained notwithstanding absence of defendants). These instances obviously involved more serious effects upon the absent defendants than the "freezing" of funds in this case.

authorized to make service under the laws of New York or under the laws of the place where service is made or by an attorney in such place (pp. 40-41, *infra*). See *United States v. Montreal Trust Co.*, decided May 1, 1964, 13 A.F.T.R. 2d ¶ 64-705 (S.D. N.Y.); *Steele v. DeLeeuw*, 40 Misc. 2d 807, 244 N.Y.S. 2d 97; *Totero v. World Telegram Corp.*, 41 Misc. 2d 33, 245 N.Y.S. 2d 870; *Developers Sm. Bus. Inv. Corp. v. Puerto Rico Land & Devel. Corp.*, 246 N.Y.S. 2d 896.* In addition, personal jurisdiction over Omar may be obtained or reinforced if Omar makes a general appearance to defend this action on the merits—a course which it may take in order to protect other property over which the district court unquestionably has jurisdiction. Although there is a conflict of authority as to

* Section 302(a) did not become effective until September 1, 1963. However, as does its Illinois counterpart, the section applies to transactions occurring before its effective date. See, e.g., *Steele v. DeLeeuw*, 40 Misc. 2d 807, 244 N.Y.S. 2d 97; *Patrick Ellam, Inc. v. Nieves*, 41 Misc. 2d 186, 245 N.Y.S. 2d 545; *William Rand, Inc. v. Joyas DeFantasia, S.A.*, 41 Misc. 2d 838, 246 N.Y.S. 2d 778; *United States v. Montreal Trust Co.*, *supra*. See also *Nelson v. Miller*, 11 Ill. 2d 378, 143 N.E. 2d 673. Although the district court's order was issued before the statute became effective, there was still the possibility at that time that Omar might make a general or special appearance. In any event, since service on Omar may now be effected under Section 302(a), the district court's order should be sustained so as to enable the government to utilize its presently available remedies.

whether one in Omar's position may enter a special appearance to contest only so much of its liability as involves property within the court's jurisdiction (2 Moore, *Federal Practice*, Par. 12.13, and authorities there cited) there is at least an arguable basis for jurisdiction on this ground should Omar attempt to appear specially. A temporary injunction pending service of process upon the taxpayer is particularly appropriate when, as in the present case (see note 1, *supra*), taxpayer has appeared in the United States Tax Court to contest the very tax liability giving rise to the lien foreclosure action.

C. RESPONDENT CAN BE ENJOINED EVEN THOUGH THE DEPOSIT IS INITIALLY PAYABLE AT ITS MONTEVIDEO BRANCH

The court of appeals was of the view that under New York law respondent's Montevideo branch and its New York home office were "separate entities." Consequently, it concluded that since Omar's deposit was payable at the branch in the first instance, there was "no property subject to attachment within the jurisdiction of the New York courts" (R. 44). Even if the "separate entity" doctrine were deemed to fix the location of respondent's debt to Omar in Montevideo because the deposit is payable there in the first instance, it does not preclude injunctive relief against respondent of the sort granted here by the district court.

In the first place, it is apparently undisputed that respondent has control over its branches and may direct their activities. In this case, as in *First Nat. City*

Bank of N.Y. v. Internal Revenue Service, 271 F. 2d 616 (C.A. 2), certiorari denied, 361 U.S. 948, respondent's "actual, practical control" (271 F. 2d at 618) over the allegedly "separate entity" where the debt is initially payable warranted issuance against respondent of the order enjoining any form of transfer of Omar's deposits. For further transfer to or from the Montevideo account could be accomplished by the same process that made the deposit payable in Montevideo—i.e., upon written or oral instructions from the home office. The Second Circuit correctly concluded in *First Nat. City Bank v. Internal Revenue Service*, *supra*, that whatever control can be exercised by a bank's central office over its foreign branches "for any corporate purpose" it may be compelled to exercise, by appropriate order of a district court, in furtherance of a permissible governmental purpose. In the present case, respondent's central office could have "frozen" the funds payable at the Montevideo branch or transferred them elsewhere on Omar's instructions or for some other business purpose. Accordingly, respondent could be compelled by court order to perform the same act in furtherance of the government's attempt to collect the depositor's tax obligation.

Secondly, even if the Montevideo branch is considered a "separate entity" for some purposes, it is obviously nothing more than an arm of respondent for others. The statutory scheme contemplates that the branches and the home office of a national bank constitute a single corporation or banking association.

12 U.S.C. 601, 604. And this Court has said that "[t]axation of a bank's branch is taxation of the bank itself." *Domenech v. National City Bank*, 294 U.S. 199, 204. Hence, irrespective of the situs of the debt for purposes of jurisdiction *quasi in rem*, the Montevideo branch should be deemed personally present in the Southern District of New York once respondent's home office is served. The New York decisions which have invoked the "separate entity" doctrine have treated it as a rule applicable for purposes of attachment or to determine "the situs of the debt." *E.g.*, *Cronan v. Schilling*, 100 N.Y.S. 2d 474, 476, affirmed, 282 App. Div. 940, 126 N.Y.S. 2d 192; *Bluebird Undergarment Corp. v. Gomez*, 139 Misc. 742, 249 N.Y.S. 319. But the doctrine has not been applied by the New York courts as a limitation on a court's jurisdiction *in personam* over a foreign branch.¹⁰ For only if the branch could be separately sued and served under State law could it be considered as a "separate entity" beyond the jurisdiction of

¹⁰ There is a well recognized difference between considering a debt to be present within a jurisdiction for purposes of attachment or other *quasi in rem* proceedings and considering the debtor present for purposes of *in personam* orders. In *Douglass v. Phenix Insurance Co.*, 138 N.Y. 209, 219, for example, the New York Court of Appeals held that a debt's situs for attachment purposes was only at the domicile of the creditor or debtor, even though the debtor might obviously be served elsewhere. That decision was subsequently overruled by statute. See *Morris Plan Ind. Bank v. Gunning*, 295 N.Y. 324, 329-330. Under *Harris v. Balk*, 198 U.S. 215, it is, of course, permissible for a State to treat the debt as "following the debtor." But that decision does not require a State to do so; nor does it compel such a result for all purposes, once the State has accepted the rule for ordinary attachment or garnishment.

a State court which has obtained personal service on its home office. We have found no New York decision to indicate that the State courts would go so far.

Moreover, even if New York's "separate entity" doctrine were interpreted by the State courts as a requirement that the branch be separately served in order that personal jurisdiction over it be obtained, such a local rule would not govern a federal claim against this federally chartered banking corporation in the federal courts. Compare *Woods v. Interstate Realty Co.*, 337 U.S. 535, which involved a diversity action. Rule 17(b) of the Federal Rules of Civil Procedure provides that the capacity of a corporation to sue and be sued "shall be determined by the law under which it was organized." Respondent and its branches are a single corporation organized under a federal statute which authorizes the corporation as a whole—not each office separately—to "sue and be sued." 12 U.S.C. 24. Accordingly, a court which obtains jurisdiction over the home office has before it all the branches as well. Even if the situs of the debt in this case were beyond the district court's jurisdiction, respondent's branch was effectively before the court once its home office was served. Consequently, an *in personam* order could be entered against the entire bank—its foreign branches as well as its home office—restraining it from transferring funds held anywhere for Omar.

As we demonstrate at pp. 32–37, *infra*, there are no substantial policy obstacles to the granting of this relief to the United States. Respondent offered no

proof that the mere "freezing" of the obligation pending service of process on Omar in a federal tax enforcement action would violate foreign law, and the district court reserved the authority to modify the injunction if a satisfactory showing were made in this regard. Indeed, the court of appeals in effect acknowledged that once jurisdiction was perfected by service of process, relief should not be barred by policy considerations. Accordingly, whatever inconvenience exists is limited to the normally brief period between initiation of a tax collection action against a taxpayer with a foreign branch deposit who is amenable to process and the formal service of process on that taxpayer.

II

THE DISTRICT COURT HAD AUTHORITY TO ENTER THE TEMPORARY INJUNCTION TO PRESERVE FUNDS OVER WHICH IT HAD JURISDICTION *QUASI IN REM*

Our alternative contention is that the district court has jurisdiction to enter the temporary injunction because it had jurisdiction ultimately to foreclose the tax lien on respondent's debt to Omar with respect to deposits initially payable at respondent's Montevideo branch. We agree with the court of appeals that the determinative question here is "whether [respondent] holds property or rights to property of the taxpayer Omar subject to the jurisdiction of the district court" (R. 39), but we disagree with the court's conclusion that because of New York's "separate entity" doctrine there is "no property subject to attachment within the jurisdiction of the New York courts"

(R. 44). We urge that respondent's debt to Omar with respect to the Montevideo deposit is "property" within the meaning of the governing provisions of the Internal Revenue Code; that it is "within the district" as required by 28 U.S.C. 1655; and that even if the "separate entity" doctrine would be applied by the New York courts to fix the situs of respondent's debt in Montevideo—an assumption which is not free of doubt—that doctrine does not govern federal tax collection.

A. RESPONDENT'S DEBT TO OMAR INITIALLY PAYABLE IN MONTEVIDEO CONSTITUTES "PROPERTY" WHICH IS "WITHIN THE DISTRICT" UNDER THE APPLICABLE PROVISIONS OF THE INTERNAL REVENUE CODE AND THE STATUTE GOVERNING VENUE

Section 6321 of the Internal Revenue Code (p. 38, *infra*) imposes a tax lien upon "all property and rights to property" of a delinquent taxpayer. Section 7403(a) (pp. 38-39, *infra*) provides that an action may be brought to foreclose this lien "or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of" the tax. Venue in an action to foreclose a federal tax lien is governed by 28 U.S.C. 1655 (pp. 39-40, *infra*) which "provides an exemption from the general venue statute" (Hart & Wechsler, *The Federal Courts and the Federal System*, pp. 954-955) by permitting suit to be brought in any judicial district in which property subject to the lien is located. See, e.g., *United States v. Dallas Nat. Bank*, 152 F. 2d 582 (C.A. 5). As the First Circuit recently observed in *Equitable Life Assurance Society of U.S. v. United States*, 331 F. 2d 29, 34

(C.A. 1), "any chose of sufficient vitality to support a lien cognizable under section 7403 must equally qualify as property under section 1655." Bank deposits have been held to constitute "property" within the meaning of section 1655. *Omaha Nat. Bank v. Federal Reserve Bank*, 26 F. 2d 884 (C.A. 8); *A/S Kredit Bank v. Chase Manhattan Bank*, 155 F. Supp. 30, 36 (S.D.N.Y.); cf. *Day v. Wilson*, 286 F. 2d 274 (C.A. 10).

It follows that if Omar's deposit were initially payable at respondent's home office in New York City, an action *quasi in rem* to foreclose the tax lien on the debt evidenced by such deposits would be maintainable in the Southern District of New York, notwithstanding failure to obtain personal jurisdiction over Omar. The fact that the debt is initially payable by respondent at its branch in Montevideo does not affect the status of respondent's debt to Omar as "property" or "rights to property" of a taxpayer within the meaning of the applicable lien provisions of the Internal Revenue Code, since those provisions include no territorial restriction. And we submit that apart from New York's "separate entity" doctrine—which we believe to be inapplicable for reasons stated below (pp. 28-32, *infra*)—respondent's undertaking to pay the deposit in Montevideo did not remove the situs of the respondent's debt to Omar from New York for purposes of the federal tax lien law and 28 U.S.C. 1655, which may be availed of only with respect to "property within the district."

As has been demonstrated above (pp. 19-22, *supra*), the Montevideo branch and the home office—along

with all other foreign branches—add up to a single corporate body. The corporation is in New York; indeed, all of its component parts are controlled from the home office in New York. Laying aside for the moment the “separate entity” doctrine of New York’s banking law (which we discuss at pp. 28–32, *infra*), it hardly seems questionable that if a foreign office of an ordinary business corporation were to incur a legitimate corporate debt, the obligation would be enforceable in the jurisdiction of the corporation’s main office after service upon that office. The corporation could *not* claim that its foreign office—which has no separate legal existence—is the sole debtor and that the debt’s situs is where the office is located. The only legally cognizable debtor in such a case would be the whole corporation, and it could obviously be “found” where its main office is located. Cf. *Varga v. Credit-Suisse*, 2 App. Div. 2d 596, 157 N.Y.S. 2d 391. If this principle is applied to the present case, Omar’s “debtor” can only be said to be respondent—its home office together with all its branches—since all its components constitute one corporate body. The most that can be said in support of respondent’s position is that the single corporation has become obliged to pay the debt in a jurisdiction other than where its home office is located. But this obligation does not alter the situs of the debt for purposes of jurisdiction *quasi in rem*.

In *Harris v. Balk*, 198 U.S. 215, this Court sustained the jurisdiction of a State court to attach or garnish a debt and proceed to a judgment *quasi in rem* binding on the creditor by obtaining jurisdiction

over such creditor's debtor. Although the Court reached its conclusion in *Harris v. Balk* on the premise that the garnishee's creditor (i.e., the plaintiff's debtor) could sue the garnishee on the debt in the jurisdiction where garnishment was sought, that fact was not considered determinative in later cases following *Harris v. Balk*. See *The Copperfield*, 7 F. 2d 499 (S.D. Ala.), affirmed, *sub nom. Aktieselskabet Dea v. Wrightson*, 26 F. 2d 175 (C.A. 5), certiorari denied, 278 U.S. 623; *Schlaefer v. Schlaefer*, 112 F. 2d 177, 182-183 (C.A. D.C.) (dictum). And State courts have generally permitted garnishment of debts which are payable only outside the jurisdiction¹¹ even if the creditor is obliged to demand payment at a specified place before bringing suit within the jurisdiction.¹² Hence it appears that a court's power to proceed *quasi in rem* against a debt owed by a person or other legal entity over whom it has jurisdiction is not affected by the fact

¹¹ See *Pierce v. Pierce*, 153 Ore. 248, 56 P. 2d 336; *Farrar v. American Express Co.*, 219 S.W. 989; *Morrison v. Illinois Central R. Co.*, 101 Neb. 49, 161 N.W. 1032; *Shuttleworth & Co. v. Marx & Co.*, 159 Ala. 415, 49 So. 83; *Steer v. Dow*, 75 N.H. 95, 71 Atl. 217; *Harrey v. Thompson*, 128 Ga. 147, 57 S.E. 104; *Baltimore & Ohio R. Co. v. Allen*, 58 W. Va. 388, 52 S.E. 465; see also *Cross v. Brown, Steese & Clarke*, 19 R.I. 220, 33 Atl. 147, affirmed *sub nom. King v. Cross*, 175 U.S. 396.

¹² See *Grant County Service Bureau, Inc. v. Treweek*, 19 Wis. 2d 548, 554, 120 N.W. 2d 634, 638-639 (dictum); *Godfrey Coal Co. v. Gray*, 296 Mass. 323, 5 N.E. 2d 556; *Steer v. Dow*, *supra*; *Graf v. Wilson*, 62 Ore. 476, 125 Pac. 1005; *Baltimore & Ohio R. Co. v. Allen*, *supra*; but cf. *Commercial Nat. Bank of Chicago v. Chicago, M & St. P.R. Co.*, 45 Wis. 172; *Morphet v. Morphet*, 19 Ill. App. 2d 304.

that the debt is payable only outside the court's jurisdiction. To hold otherwise would be to accept the contention rejected in *Schlaefter v. Schlaefter*, 112 F. 2d at 182, "that the debt has an exclusive situs at the place designated for payment, similar to that of real estate or to that commonly attributed to tangible personalty for taxation and other purposes." Such a holding would have the effect of permitting the parties to a debt to immunize their obligation from attachment or garnishment by specifying a particular location for payment, thereby frustrating the objective of decisions such as *Harris v. Balk* which were intended "to extend rather than to restrict the enforceability of the debt." *Ibid.*

Consequently, the debt owed by respondent to Omar, although assumed to be payable in the first instance only in Montevideo, is "property" and a right to property within the meaning of the Internal Revenue Code and therefore could be brought under the court's jurisdiction in an appropriate action *quasi in rem* in any district in which the respondent could be served. Section 1655 authorizes district courts to assume jurisdiction *quasi in rem* in tax lien foreclosure cases when such jurisdiction is warranted. The present case involved a permissible exercise of that authority.

B. NEW YORK'S "SEPARATE ENTITY" DOCTRINE DID NOT PRECLUDE THE DISTRICT COURT'S EXERCISE OF JURISDICTION OVER THE DEBT SINCE THAT DOCTRINE DOES NOT GOVERN IN THIS FEDERAL TAX-COLLECTION PROCEEDING

The court of appeals was of the view that the district court could not obtain jurisdiction *quasi in rem* over the debt created by Omar's account in Montevi-

deo because of "a consistent line of [New York] authority holding that accounts in a foreign branch bank are not subject to attachment or execution by the process of a New York court served in New York on a main office, branch or agency of the bank" (R. 41). We submit that this conclusion was erroneous because even if New York's "separate entity" doctrine would be applied by the State courts to bar attachment or garnishment in a suit between private parties in a situation such as the one presented here,"¹³

¹³ There is a distinguishing feature between the factual situation here and those in the New York decisions applying the "separate entity" doctrine in the bank's favor. In the present case, unlike *Bluebird Undergarment Corp. v. Govez*, 139 Misc. 742, 249 N.Y.S. 319, and *Clinton Trust Co. v. Compania Azucarera Central Mabuy S.A.*, 172 Misc. 148, 14 N.Y.S. 2d 743, affirmed, 258 App. Div. 780, 15 N.Y.S. 2d 721, it affirmatively appears in the record that respondent's central office participated in the transfer of the funds to the foreign branch. The New York doctrine appears to be based on the "intolerable burden" (*Cronan v. Schilling*, 100 N.Y.S. 2d 474, 476, affirmed, 282 App. Div. 940, 126 N.Y.S. 2d 192) or "crippling effect" (*Newtown Jackson Co. v. Animashaun*, 148 N.Y.S. 2d 66, 68) which would be imposed on banks if they were required to notify all branches of any writs of attachment or garnishment that had been served upon them. It might well be sufficiently less burdensome today for a central office to notify the one branch to which it had transferred funds that attachment proceedings were pending to warrant a different result when, as here, the central office has sent the funds to the branch in the first instance. The result in *Sokoloff v. National City Bank*, 130 Misc. 66, 224 N.Y.S. 102, affirmed, 223 App. Div. 754, 227 N.Y.S. 907, affirmed, 250 N.Y. 69, 164 N.E. 745, where the central office did participate in the transfer to the foreign branch, is not inconsistent with this suggested distinction since the court in *Sokoloff* concluded that the deposit could be reached on other grounds. Consequently, it is possible that even the New York courts would not find it necessary to extend the "separate entity" doctrine to cover the present factual situation.

this local rule should not control in a federal tax-collection proceeding.

It is true that a federal tax lien can reach only such property as the taxpayer has or is entitled to under State law. *United States v. Bess*, 357 U.S. 51, 55; *Aquilino v. United States*, 363 U.S. 509. But that rule does not mean that the government may be prevented from reaching certain property rights merely because the taxpayer has not yet elected to exercise them. Although a taxpayer may secure the cash surrender value of a life insurance policy only after filing a formal notice of election and surrendering the policy, the government's tax lien attaches to, and may be enforced against, the cash surrender value of the policy notwithstanding the taxpayer's refusal to make the election. *Equitable Life Assurance Society of U.S. v. United States*, 331 F. 2d 29 (C.A. 1); *United States v. Metropolitan Life Insurance Co.*, 256 F. 2d 17 (C.A. 4). But see *United States v. Metropolitan Life Insurance Co.*, 130 F. 2d 149 (C.A. 2). Similarly, the fact that a taxpayer may not secure the corpus of a trust without formally revoking the trust does not mean that a tax lien will reach the trust property only upon compliance with this condition by the government or the taxpayer. *United States v. Peelle*, 159 F. Supp. 45 (E.D. N.Y.).¹⁴ The

¹⁴ Similar to these are other cases in which it was held that formal acts which must be performed by taxpayers need not be done by the government before a tax lien attaches. See *United States v. Bowery Savings Bank*, 297 F. 2d 380 (C.A. 2); *United States v. Manufacturers Trust Co.*, 198 F. 2d 366 (C.A. 2); *United States v. Emigrant Industrial Sav. Bank*, 122 F. Supp. 547 (S.D. N.Y.); *United States v. Buia*, 144 F. Supp. 477 (S.D. N.Y.) (presentation of a passbook for a bank

reason for the rule was explained by the Fourth Circuit in *United States v. Metropolitan Life Insurance Co.*, 256 F. 2d 17, 25, as follows:

When, however, they [the insurance policies] are unavailable for surrender, because the owner has absconded to a foreign country and is beyond the reach of personal process, and when the interest of the insurer will be protected by the judgment of the court, the insurer should be required to pay the cash surrender value in the proceeding under the statute. * * * we "see no reason to uphold a taxpayer who admits he has an interest in property but flauntingly says it is beyond the reach of the Government." To which we may add that the court is not so impotent that it cannot apply to the satisfaction of tax liens property interests of a taxpayer held by corporations within its jurisdiction.

In the present case it is obvious that Omar has the actual power to control the location at which payment is to be made by respondent; the bank will doubtless pay the deposit at any branch designated by Omar. In effect, Omar is admitting that it "has an interest in property but flauntingly says it is beyond the reach of the Government" by reason of New York's "separate entity" rule.¹⁵ In this situa-

deposit). See also *United States v. Schuermann*, 106 F. Supp. 86 (E.D. Mo.); *United States v. Caldwell*, 74 F. Supp. 114 (M.D. Tenn.) (surrender of a negotiable instrument).

¹⁵ It is no answer to this argument to say that the debt in the present case—unlike those in the life insurance and trust cases—is payable in the first instance in a foreign jurisdiction. As has been noted above, pp. 24-28, *supra*, the location at which the debt is payable is no limitation on the court's jurisdiction *quasi in rem*.

tion, as in the related ones where the question is whether taxpayer can be said to have received income, the critical question is whether the taxpayer has "actual command over the property," *Corliss v. Bowers*, 281 U.S. 376, 378, and whether this command may, at his election, make the property payable within the district court's jurisdiction. If this test is met, and if, in addition, the court has jurisdiction over the debtor—particularly if the debtor's home office is within the district—the taxpayer should be considered, for federal tax-collection purposes, as holding that property (or the rights thereto) within the district irrespective of State law.

III

NO REASONS OF POLICY WARRANT DENIAL OF THE TEMPORARY INJUNCTION

The court of appeals relied, to some extent, on respondent's contention that sound public policy demanded that the relief requested by the government be denied (R. 48-49.) However, an analysis of the policy grounds relied upon by respondent in this Court and those adopted by the court of appeals discloses that none of the asserted reasons justifies withholding the relief which the government seeks.

A. THE PROSPECT OF MULTIPLE LIABILITY IS REMOTE AND SHOULD NOT, IN ANY EVENT, BAR RELIEF

Respondent argues that no order of the district court could relieve it "from the consequences of its conduct in the foreign country" and that this leaves

it open "to multiple liability" (Br. in Op. 6). This contention overlooks several important considerations.

First, the district court's opinion expressly reserved authority to modify its order if respondent presented "proof" that compliance with the order "would violate local law" (R. 28). As the court observed, respondent alleged that the "freezing" of the foreign deposits would violate foreign law, but it failed entirely to come forward with supporting proof.

Second, in the absence of proof that the mere "freezing" of the assets would cause respondent to violate Uruguayan law, it is apparent that respondent's fear of multiple liability is entirely premature. If it complies with the district court's order, respondent is, on this hypothesis, engaging in no unlawful activity and will presumably incur no liability.¹⁶

Third, even if respondent is ultimately required to transfer the funds on deposit to the United States, such an order would, under our first contention (pp. 10-23, *supra*), follow valid service of process on Omar. If Omar were then required to make the de-

¹⁶ The possibility that an action might be brought in the foreign jurisdiction for slander of credit if respondent, in compliance with the order, refuses to release the funds on deposit, presupposes that respondent has a legal obligation in that jurisdiction to permit withdrawal of the funds notwithstanding the order of a United States District Court. Respondent's failure to prove that "freezing" of the assets would result in "a violation of foreign law" indicates—in the absence of evidence to the contrary—that the foreign jurisdiction would accept the generally recognized defense to such an action that an outstanding court order prohibited payment on the depositor's account. See Comment, *Bank Responsibility to Third Party Claimant Against Depositor's Account*, 30 Marq. L. Rev. 54, 61 (1946).

posit available to meet its tax obligation, it is unlikely that it could subsequently attack a transfer taking place in accordance with any such judgment in a suit brought by it against respondent in a foreign jurisdiction to collect the amount of the deposit. Having been personally present in the Southern District of New York and having been compelled to transfer the deposit by an order of that court, Omar would be bound by that transfer in a foreign jurisdiction. See *Naamloze Vennootschap v. Chase Nat. Bank*, 111 F. Supp. 833 (S.D.N.Y.); cf. *Phillips v. Phillips*, 224 Ark. 225, 272 S.W. 2d 433; *Deschenes v. Tallman*, 248 N.Y. 33, 161 N.E. 321¹⁷

Fourth, if jurisdiction *quasi in rem* is sustained and the court forecloses on the government's tax lien, the prospect of double liability in this case is not substantially greater than it would be in any case in which a garnishee may be sued in a foreign jurisdiction—even if the garnisheed debt is collectible in the United States and clearly has a situs here. Consequently, if the possibility of multiple liability were a defense to tax lien foreclosures such as this one, it should also be a defense when the debt indisputably has a situs within the United States. Indeed, the possibility of double liability arises in purely domestic

¹⁷ Even a foreign court which would not enforce an unexecuted United States judgment arising out of a tax claim, see, e.g., *United States of America v. Harden*, Supreme Court of Canada, October 2, 1963, 63-2 U.S.T.C. ¶9768, would recognize a transfer of property "fully executed" under U.S. law pursuant to such a judgment. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 414.

garnishment proceedings as well,¹⁸ and it is no defense in such situations.

B. THE POSSIBLE EFFECT ON THE ATTRACTIVENESS OF AMERICAN BRANCH BANKS TO FOREIGN DEPOSITORS IS NO REASON TO DENY RELIEF

The court of appeals was apparently concerned over the possibility that an order such as the one granted by the district court would be injurious to American branch banking (R. 48-49). We submit that the injury is minimal, if not nonexistent.

1. The possibility that the "artful tax dodger" (R. 48) will avoid American banks is entirely consistent with Congress' purpose in authorizing foreign branch banking. In enacting recent legislation authorizing the expansion of foreign branch banking by national banks, 76 Stat. 388, Congress explicitly manifested an intention to prevent these facilities from being used by tax evaders. The House committee report states:

The committee wishes to make clear * * * that it does not believe nor intend that this legislation should offer any opportunity for tax evasion. Additionally the committee requests that in the implementation of this legislation by regulation that every effort be made to guard against the creation of any such opportunities.¹⁹

2. Nor is the law-abiding foreign depositor likely to be dissuaded from using American branch banks. In the first place, his deposited funds could be "frozen" under our primary contention (pp. 10-23, *supra*):

¹⁸ See, e.g., *Karp v. First National Bank*, 295 Mass. 365, 3 N.E. 2d 733; *Riley v. State Bank of De Pere*, 223 Wis. 16, 269 N.W. 722. See generally Note, *Double Liability of Garnishees Resulting From Failure of Jurisdiction*, 48 Yale L. J. 690 (1939); Annot., 49 A.L.R. 1411, 166 A.L.R. 272.

¹⁹ H. Rep. No. 2047, 87th Cong., 2d Sess., p. 2.

only if there were a reasonable possibility that he could be lawfully served with process in the United States—in which event any property belonging to him in any bank, American or foreign, could be reached by an order *in personam*. Most important, the Treasury Department has recently issued a regulation (Appendix, pp: 41-43, *infra*) which limits the power of the Internal Revenue Service to institute judicial proceedings to reach foreign branch deposits to situations in which, as here, either “the taxpayer is within the jurisdiction of a United States court” or the “deposits consist, in whole or in part, of funds transferred from the United States * * * in order to hinder or delay the collection of a tax imposed by the Code.” Consequently, the foreigner who deposits directly in a foreign branch of a United States bank or who has not transferred deposits from the United States to a branch to hinder or delay tax collection need not fear that his bank accounts will be “frozen” because of some tax claim by the United States.

3. Our second contention (pp. 23-32, *supra*) turns on the proposition that the district court has jurisdiction *quasi in rem* because this is a federal tax-collection action. Accordingly, potential foreign depositors in American branch banks would have no cause to apprehend that private citizens would use garnishment proceedings in courts of the United States to reach the deposits of foreign corporations which are not amenable to service of process in the United States. For unless, under our first argument, there is a reasonable possibility that the foreign corporation can be served in the district, the “separate

entity" doctrine would prevent any such private action.

4. Finally, the recent Treasury regulation also provides that routine tax liens will not affect foreign branch deposits. Only when "the notice of levy specifies that the district director intends to reach such deposits" will they be subjected to a tax levy. Thus the banks will be put clearly on notice in the few cases where a levy is intended to reach deposits transferred from the United States to frustrate tax collection, and only after such notice will they be obliged to inform their branches of the levy.

In sum, the possible effect on branch banking does not justify denial of the relief afforded by the district court's temporary injunction.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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AUGUST 1964.

APPENDIX

Internal Revenue Code of 1954:

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1958 ed., Sec. 6321.)

SEC. 7402. JURISDICTION OF DISTRICT COURTS.

(a) *To Issue Orders, Processes, and Judgments.*—The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

* * * * *

(26 U.S.C. 1958 ed., Sec. 7402.)

SEC. 7403. ACTION TO ENFORCE LIEN OR TO SUBJECT PROPERTY TO PAYMENT OF TAX.

(a) *Filing.* In any case where there has been a refusal or neglect to pay any tax, or to

discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

* * * * *

(26 U.S.C. 1958 ed., Sec. 7403.)

28 U.S.C.:

SEC. 1655. LIEN ENFORCEMENT; ABSENT DEFENDANTS.

In an action in a district court to enforce any lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within the district, where any defendant cannot be served within the State, or does not voluntarily appear, the court may order the absent defendant to appear or plead by a day certain.

Such order shall be served on the absent defendant personally if practicable, wherever found, and also upon the person or persons in possession or charge of such property, if any. Where personal service is not practicable, the order shall be published as the court may direct, not less than once a week for six consecutive weeks.

If an absent defendant does not appear or plead within the time allowed, the court may proceed as if the absent defendant had been served with process within the State, but any adjudication shall, as regards the absent defendant without appearance, affect only the property which is the subject of the action. When a part of the property is within another district, but within the same state, such action may be brought in either district.

Any defendant not so personally notified may, at any time within one year after final judgment, enter his appearance, and thereupon the court shall set aside the judgment and permit such defendant to plead on payment of such costs as the court deems just.

New York Civil Practice Law and Rules, 7B McKinney's Consolidated Laws of New York, Annotated:

SEC. 302. PERSONAL JURISDICTION BY ACTS OF NON-DOMICILIARIES

(a) *Acts which are the basis of jurisdiction.* A court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, as to a cause of action arising from any of the acts enumerated in this section, in the same manner as if he were a domiciliary of the state, if, in person or through an agent, he:

1. transacts any business within the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. owns, uses or possesses any real property situated within the state.

(b) *Effect of appearance.* Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section.

SEC. 313. SERVICE WITHOUT THE STATE GIVING PERSONAL JURISDICTION

A person domiciled in the state or subject to the jurisdiction of the courts of the state under section 301 or 302, or his executor or administrator, may be served with the summons without the state, in the same manner as service is made within the state, by any person authorized to make service within the state who is a resident of the state or by any person authorized to make service by the laws of the state, territory, possession or country in which service is made

or by any duly qualified attorney, solicitor, barrister, or equivalent in such jurisdiction.

Treasury Regulations on Procedure and Administration (1954 Code):

SEC. 301.6332-1 [as amended by T.D. 6746]

Surrender of property to levy.

(a) *Requirement*—(1) *In general.* Any person, in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the district director, surrender such property or rights (or discharge such obligation) to the district director, except such part of the property or right as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(2) *Property held by banks.* Notwithstanding subparagraph (1) of this paragraph, if a levy has been made upon property or rights to property subject to levy which a bank engaged in the banking business in the United States or a possession of the United States is in possession of (or obligated with respect to), the Commissioner shall not enforce the levy with respect to any deposits held in an office of the bank outside the United States or a possession of the United States, unless the notice of levy specifies that the district director intends to reach such deposits. The notice of levy shall not specify that the district director intends to reach such deposits unless the district director believes—

(i) That the taxpayer is within the jurisdiction of a United States court at the time the levy is made and that the bank is in possession of (or obligated with respect to) deposits of the taxpayer in an office of the bank outside the United States or a possession of the United States; or

(ii) That the taxpayer is not within the jurisdiction of a United States court at the time the levy is made, that the bank is in possession

of (or obligated with respect to) deposits of the taxpayer in an office outside the United States, or a possession of the United States, and that such deposits consist, in whole or in part, of funds transferred from the United States or a possession of the United States in order to hinder or delay the collection of a tax imposed by the Code. For purposes of this subparagraph the term "possession of the United States" includes Guam, the Midway Islands, the Panama Canal Zone, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, and Wake Island.

* * * * *

(26 C.F.R., Sec. 301.6332-1.)

Sec. 301.7401-1 [as amended by T.D. 6746, *supra*]. *Authorization.*

(a) *In general.* No civil action for the collection or recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner (or the Director, Alcohol and Tobacco Tax Division, with respect to the provisions of subtitle E of the Code) authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced. With respect to forfeitures, the assistant regional commissioner or supervisor in charge (alcohol and tobacco tax) may also authorize or sanction the proceedings.

(b) *Property held by banks.* The Commissioner shall not authorize or sanction any civil action for the collection or recovery of taxes, or of any fine, penalty, or forfeiture, from any deposits held in a foreign office of a bank engaged in the banking business in the United States or a possession of the United States unless the Commissioner believes—

(1) That the taxpayer is within the jurisdiction of a United States court at the time the civil action is authorized or sanctioned and that the bank is in possession of (or obligated with respect to) deposits of the taxpayer in an office

of the bank outside the United States or a possession of the United States; or

(2) That the taxpayer is not within the jurisdiction of a United States court at the time the civil action is authorized or sanctioned, that the bank is in possession of (or obligated with respect to) deposits of the taxpayer in an office outside the United States or a possession of the United States, and that such deposits consist, in whole or in part, of funds transferred from the United States or a possession of the United States in order to hinder or delay the collection of a tax imposed by the Code.

For purposes of this paragraph, the term "possession of the United States" includes Guam, the Midway Islands, the Panama Canal Zone, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, and Wake Island.

(26 C.F.R., Sec. 301.7401-1.)

No. 59

Office-Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

UNITED STATES OF AMERICA, *Petitioner,*

v.

FIRST NATIONAL CITY BANK, *Respondent,*

—and—

OMAR, S.A., a Uruguayan corporation; LAZARD FRESSES &
CO.; LEHMAN BROTHERS; BELGIAN-AMERICAN BANKING
CORP.; BELGIAN-AMERICAN BANK AND TRUST CO.; and
FIRST NATIONAL CITY TRUST CO., *Defendants.*

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

**BRIEF FOR RESPONDENT
FIRST NATIONAL CITY BANK**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

No. 59

UNITED STATES OF AMERICA, *Petitioner,*

v.

FIRST NATIONAL CITY BANK, *Respondent,*

—and—

OMAR, S.A., a Uruguayan corporation; LAZARD FRERES &
CO.; LEHMAN BROTHERS; BELGIAN-AMERICAN BANKING
CORP.; BELGIAN-AMERICAN BANK AND TRUST CO.; and
FIRST NATIONAL CITY TRUST CO., *Defendants.*

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

**BRIEF FOR RESPONDENT
FIRST NATIONAL CITY BANK**

Questions Presented

The court of appeals, sitting en banc, has found that the power of a district court over the head office management of an American bank did not justify the court in requiring that bank to take action in a foreign country with respect to property of another, there situated, which was

beyond the jurisdiction of both the Internal Revenue Service and the court itself. The questions presented are:

1. Must the determinations of the court of appeals be reversed to aid petitioner's attempts at extra-territorial enforcement of its *ex parte* tax assessments, despite the finding of the court of appeals that the powers sought by petitioner would "impose an intolerable burden on the banking community"? (R. 45).

2. May a district court employ the drastic provisional remedy of injunction in an action in which it has no jurisdiction to enforce a final order?

Statement

The petitioner has invoked the power of the district court over the respondent bank, or more accurately its head office management, to force the bank to perform an act beyond the capabilities of either the petitioner or the court itself.

The petitioner seeks to reach property or rights to property of Omar, S. A., a Uruguayan corporation, and to apply that property against taxes claimed to be owing by that foreign corporation. In aid of that attempt, in the late afternoon on October 31, 1962 the petitioner served upon the respondent bank a notice of tax lien and a notice of levy (see R. 23), a temporary restraining order contained in an order to show cause, which sought the issuance of an injunction against the bank (R. 9-10), and a summons and complaint (R. 3-8) in which the petitioner prayed that the district court compel the respondent bank "to return all property and rights to property of . . . Omar, S. A., to the jurisdiction of [the district court] for disposition and application" with respect to petitioner's tax claim (R.

23).^{*} The district court granted the requested injunction (R. 30-31).

The court of appeals reversed the decision of the district court and that reversal was adhered to after rehearing en banc. The court of appeals, balancing the "intolerable burden on the banking community" (R. 45) against the benefits which petitioner claimed could accrue to the revenue authorities from exercise of the admittedly novel power demanded, concluded that a grant of that power "would lead only to harmful consequences for our banking system abroad without any concomitant benefits here at home" (R. 48). Thus, the court of appeals expressly founded its decision not only upon what the dissenting judge conceded was "an admirable display of my colleague's well-known erudition and of his customary careful and exhaustive research" (R. 49) but also upon a careful weighing of the policy considerations. The court of appeals concluded, after argument, reargument and extensive briefing, that the unprecedented prerogative demanded by the petitioner would be a self-defeating mechanism, proscribed not only by the relevant authorities but by all considerations of reason and justice.^{**}

^{*} For the purposes of argument, we will assume, as did the court of appeals, that at the time of service of the papers Omar maintained an account at the Montevideo branch of the respondent bank.

^{**} The decision of the court of appeals has been favorably reviewed in legal periodicals. *E.g.*, 64 Colum. L. Rev. 774 (1964); 62 Mich. L. Rev. 1084 (1964);

"The instant decision reaffirms and reinforces a body of law long recognized in the field of foreign branch banking. Without the separate entity doctrine, the stability of our branch banking system would be greatly altered. For reasons of precedent and practicality, this court [the Second Circuit] reached a sound decision in extending the doctrine to apply to an injunction proceeding." 9 Vill. L. Rev. 339, 343 (1964).

Summary of Argument

The respondent bank is a party to this proceeding only because it is alleged to be in possession of property or property rights of Omar; there is no suggestion that the respondent is itself delinquent in respect of any taxes or in performance of any obligations lawfully imposed upon it. The hypothetical property of Omar which the petitioner seeks to reach is not within the jurisdiction of the court; if it exists at all it lies outside the borders of the United States and within the territory of friendly foreign sovereigns.

The accuracy of these statements was recognized by the district court and in the dissenting opinion in the court of appeals; on this point there is judicial unanimity.

The petitioner seeks to sequester bank accounts allegedly maintained by Omar with foreign branches of the respondent bank. Such accounts, if they exist, are contracts made and to be performed in and under the laws of foreign countries, in respect of the currency of those countries. They are not tangible property, nor do they constitute property within the United States, tangible or intangible (See, *infra*, pp. 7-9).

The respondent bank holds no property for Omar within the United States, nor does Omar have any property rights enforceable in the United States against the respondent. The petitioner wrongly characterizes Omar's hypothetical accounts as being "payable, in the first instance," in the foreign country where respondent's branch does business. On the contrary such accounts would be payable exclusively in the foreign country where the respondent's branch does business. Only if the respondent violates its contractual obligation in the foreign country (as the petitioner would have it do) does any right of ac-

tion accrue against the respondent in the United States, or wherever else the respondent can be found. Such right of action, however, is for breach of contract; it is not to recover property. It is to recover damages for non-performance of contract; not to compel performance (See, *infra*, pp. 14-15).

The court below correctly found that the mere presence of the respondent within the district did not justify the district court in ordering the respondent to deal with property located outside the United States, nor in requiring it so to act outside the jurisdiction as to breach its contractual obligations (See, *infra*, pp. 21-30).

The petitioner's contentions to the contrary are unsound. The district court lacked authority to issue an injunction in a case where it had neither jurisdiction in personam of Omar nor jurisdiction in rem or quasi in rem of Omar's property (See Pet. Br. pp. 12-19; compare, *infra*, pp. 9 to 13). Deposits in foreign branches are specific contractual obligations of the bank to its depositor created and existing under foreign law and constituting property rights entirely outside the United States; neither the depositor nor anyone claiming through him can enlarge these obligations of the bank (See Pet. Br. pp. 24-28; compare, *infra*, pp. 15 to 21). The obligation of the bank to make payment in a particular currency and at a particular place is of the essence of the deposit contract; it is not a mere housekeeping detail which can be disregarded by the depositor or one claiming through him (See Pet. Br. pp. 28-32; compare, *infra*, pp. 20 to 21). Speculation as to the possibility of acquiring jurisdiction in personam over Omar is inappropriate—no factual basis is shown for petitioner's assertions; an injunction may not be used as the equivalent of extradition. (See Pet. Br. pp. 15-23; compare, *infra*, pp. 24 to 26).

The adoption of the novel rule demanded by petitioner would create demonstrable detriment to the banking system and foreign commerce of the United States, and would be adverse to the national interest; this fact found by the court below and attested by the *amici curiae* cannot be offset by petitioner's expostulations. (See Pet. Br. pp. 35-37; compare, *infra*, pp. 31 to 38).

ARGUMENT

I.

Accounts maintained on the books of foreign branches of American banks are contractual obligations created by, existing under, and performable in accordance with, foreign law. They constitute property or property rights within the foreign country which permits the branch to operate. Courts in the United States have no jurisdiction in rem or quasi in rem over such accounts.

The purpose of this proceeding by the petitioner is to seize the property or property rights represented by such accounts as Omar may maintain with foreign branches of the respondent bank. That is the only purpose of this proceeding against the bank. Although the petitioner suggests that it wishes only to freeze, and not to levy upon, this hypothetical property or right, the relief demanded in the complaint is to compel the bank "to return all property and rights to property of . . . Omar, S. A., to the jurisdiction of this Court . . . for enforcement of [petitioner's] lien on said property and rights to property . . ." (R. 8).^{*} Whether

^{*} Petitioner's statement "We stress that this injunction was not equivalent to garnishment, seizure or attachment" (Pet. Br. pp. 11-12) is inconsistent with petitioner's subsequent arguments that "The district court's exercise of jurisdiction over the debt" was proper (Pet. Br. p. 28), and that New York law could not prevent attachment or garnishment in this case (Pet. Br. pp. 29-30). "

the petitioner seeks to seize and dispose of this property as upon a levy of execution, or to seize and immobilize the property pending some further action here in the United States, is immaterial. In either aspect, the inescapable reality is that petitioner seeks, through the district court, to exercise dominion over the property or property rights in question.

It is essential, therefore, to have the record show clearly at the outset what kind of property or property right is involved.

A. A bank account is a contract. When a bank opens an account for a customer and receives money on deposit for credit to that account, the bank's undertaking is that it will, upon the depositor's special demand, repay to the depositor a like kind and amount of currency at the bank's office where the account is maintained.

Leather Manufacturers' Bank v. Merchants' Bank,
128 U. S. 26 (1888)

The Bank of British North America v. The Merchants' National Bank, 91 N. Y. 106 (1883)

Chrzanowska v. Corn Exchange Bank, 173 App. Div. 285, 159 N. Y. Supp. 385 (1st Dept. 1916),
aff'd 225 N. Y. 728, 122 N. E. 877 (1919)

Gibraltar Realty Corporation v. Mt. Vernon Trust Company, 276 N. Y. 353, 12 N. E. 2d 438 (1938)

The account is to be distinguished from a bailment in which chattels are involved; the account is a contract which confers upon the depositor no rights to any particular asset in the bank's possession. The account creates a debtor-creditor relationship, but that is not a sufficient description of the particular contract, for this debtor-creditor relationship does not imply a general obligation of the

bank but rather a particular obligation, the essence of which is that the bank's duty to pay comes into existence only upon a special demand which must be made at the place of deposit and which must relate to a like kind and amount of currency as that deposited.

B. A bank account has a situs at the location of the bank or branch where it is maintained. It is apparent that if a bank account is to be regarded as property, the property exists at the place where the account is maintained and where, under the normal expectations of banker and depositor, it is repayable.

Deutsche Bank Filiale Nurnberg v. Humphrey,
272 U. S. 517 (1926)

Zimmerman v. Hicks, 7 F. 2d 443 (2d Cir. 1925);
aff'd sub nom. Zimmerman v. Sutherland, 274
U. S. 253 (1927)

McGrath v. Agency of Chartered Bank, 104 F.
Supp. 964 (S. D. N. Y. 1952), *aff'd per curiam*,
201 F. 2d 368 (2d Cir. 1953)

Sokoloff v. National City Bank, 239 N. Y. 158, 145
N. E. 917 (1924); 250 N. Y. 69, 164 N. E. 745
(1928).

*Richardson v. Richardson & National Bank of
India, Ltd.* [1927] Probate 228, 137 L.T.R. 492,
163 L.T. 450

Woodland v. Fear, 7 E & B 519 (1857)

Rex v. Lovitt [1912] A. C. 212 (P. C.)

Martin v. Nadel [1906] 2 K. B. 26 (C. A.)

This fundamental rule of reality is emphasized in the case of a bank, such as respondent, which maintains branches throughout the world. In each country where the respondent is permitted by the local sovereignty to do business, it must act responsibly to the laws of the host country.

Local deposits are received and repaid in the currency of that country. Even within the City of New York, deposits at one branch of a bank are repayable only at that branch, notwithstanding the fact that all these branches lie within a single political sovereignty and their deposits are in United States dollars, which are money current at 55 Wall Street as they are at 399 Park Avenue, and at a branch in the Bronx. *Chrzanowska v. The Corn Exchange Bank*, 173 App. Div. 285 (1st Dept. 1916), *aff'd* 225 N. Y. 728 (1919). It is of far greater importance to respondent, however, that a deposit made in Japanese yen at its branch in Tokyo implies no obligation to repay pounds sterling at its branch in London, and it is equally clear that the customer who deposits United States dollars at a branch in New York City will not permit the bank to discharge its obligation by tendering him Peruvian soles at its branch in Lima. This Court affirmed the Second Circuit which said in *Zimmerman v. Hicks, supra*:

"We think it plain that (the banks) did not owe a certain number of units of any fixed value, nor could their debts be expressed in any universal currency; they owed only certain quantities of the thing called money within that political subdivision of the world in which the bank existed and to the laws of which it was subject." 7 F. 2d at 445.

C. The court below properly held that it had no jurisdiction in rem or quasi in rem over accounts in foreign branches. It is important that the petitioner's brief should not be permitted to obscure the holdings of the court below. The court concluded "that the injunction issued by the district court was beyond its jurisdiction as to deposits held abroad that are collectible only outside the United States." (R. 49). This holding is consistent with the nature of an

account in a foreign branch. The petitioner inaccurately characterizes the court's determination as being relevant to accounts which are "payable, in the first instance," abroad. We shall presently deal in more detail with this forensic device. (*Infra*, pp. 14-15)

At this point, however, we deem it important to emphasize that the decision of the court below relates to deposits at foreign branches which are collectible only outside the United States. Such accounts are inescapably property which has a situs in the country where the foreign branch is permitted to do business.

Petitioner concedes, as it must, that the question of the location of property or property rights, and thus the question of jurisdiction in rem or quasi in rem, must be resolved by reference to the law of New York. Petitioner further concedes, as it must, that under New York law no proceeding in rem or quasi in rem can be maintained in respect of a deposit in the foreign branch of an American bank. Petitioner seeks to escape those conclusions by intimating that perhaps these "local rules" should not control in a federal tax collection proceeding. (Pet. Br. pp. 29-30).^{*} This court, of course, has held precisely to the contrary in *United States v. Bess*, 357 U. S. 51 (1958) and *Aquilino v. United States*, 363 U. S. 509 (1960).

In its attempt to avoid the consequence of controlling law, petitioner has suggested a novel theory of hitherto un-

^{*} It is to be noted that the petitioner's attitude toward New York law is ambivalent. Petitioner urges with some vigor that Section 302 of the New York Civil Practice Law and Rules relating to the in personam jurisdiction of New York courts is available to confer jurisdiction upon a federal court in an action under a federal statute to collect a federal tax. (Pet. Br. pp. 17-18). With equal enthusiasm petitioner urges upon the court that the long-established New York rule, as to the existence or non-existence of property and property rights is a "local rule [which] should not control in a federal tax-collection proceeding". (Pet. Br. pp. 29-30).

stated and unanticipated creditors' rights. The court below properly rejected petitioner's assertion that the assessment against Omar created a global lien, collectible and enforceable wherever in the world Omar's property might be found. The court said:

"The Supreme Court has made manifest its reluctance to read an extraterritorial force into statutes when to do so would extend coverage beyond places over which the United States has legislative control [citation omitted] or would interfere with the rights of other nations [citation omitted]." (R. 47).

To suggest that courts in the United States may assert jurisdiction in rem or quasi in rem, or that their process may be effective with respect to such foreign property, is to repudiate the doctrine most recently recognized by this Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398 (1964).

In *Sabbatino*, this Court was faced with an issue arising out of legislative and administrative acts, allegedly violative of international law, done by the Republic of Cuba within its own territory. The narrow issue was as to whether the courts of the United States should inquire into the validity of these acts, specifically with respect to a certain cargo of sugar which was allegedly the subject of an illegal confiscation in Cuba by Cuba. The court found that the act by which Cuba asserted title to the sugar was a sovereign act effectuated on the property within Cuban territory and that the validity of the act and the effect of the seizure was not subject to question in our courts.

"... we decide only that the Judicial Branch will not examine the validity of a taking of *property within its own territory* . . ." 376 U. S. at 428 (emphasis added).

The application of the principles of international jurisdiction to this action to enforce an *ex parte* tax assessment was cogently put by the court below:

“The nations of the world have only recently begun to deal with the problem of extraterritorial collection of tax revenues through the medium of negotiated tax treaties providing for mutual cooperation. See Note, International Enforcement of Tax Claims, 50 Colum. L. Rev. 490 (1950). Absent an explicit indication to the contrary, there should not be attributed to Congress an intent to give the courts of this nation, in this highly sensitive area of inter-governmental relations, the power to affect rights to property wherever located in the world. The apparent necessity of tax treaties underscores the conclusion that Congress has seen fit to handle this problem in another manner.” (R. 48).

Indeed, petitioner itself has recognized that the acts of a government within its territory do not and cannot affect contractual obligations to be performed elsewhere. In *Pan-American Life Insurance Company v. Lorido*, (Nos. 379, 380, October Term, 1963) cert. den. 377 U. S. 990 (1964), petitioner submitted a memorandum, at the request of this Court, in which it stated:

“The principle precluding inquiry by our courts into the validity of foreign acts of state, and requiring the recognition of rights derived from such governmental acts, applies only to acts affecting property or rights within the acting sovereign’s territorial jurisdiction.”

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“The only act of the Government of Cuba which dealt with property or rights located in Cuba was the expropriation of [Pan-American’s] Cuban property. This expropriation could not determine [Pan-American’s] obligation to perform its contracts with third

parties outside Cuba in circumstances where the contracts provided for performance in places other than Cuba." (pp. 3, 4).

We submit that it is established beyond question that a bank account is a special contract; that this contract constitutes property or rights to property having a situs at the location of the bank, or branch, or agency where the account is maintained; that such property is subject to levy or distraint by the sovereign within whose territory the bank, branch, or agency is maintained; that the laws or process of other sovereigns have no extraterritorial effect and cannot affect property outside their own boundaries; and that these views have consistently been put forward as the policy of the United States and accepted by the courts as the law of the United States. It follows that in the instant case the district court had no jurisdiction in rem or quasi in rem over accounts maintained on the books of the respondent's foreign branches and collectible only abroad.

II.

Neither Omar nor any party claiming through Omar has any right of action against respondent in New York in respect of accounts maintained on the books of respondent's foreign branches.

The obligation undertaken by a bank, at the time an account is opened on the books of one of its foreign branches, is only to repay, in the currency of the account, at the counters of that branch, and upon special demand of the depositor. This obligation is a contract made in, to be performed in, and wholly governed by and enforceable

under the laws of, the host country. It is a creature of foreign law.

In the event that the bank defaults in the performance of its obligation, then the depositor has a remedy, as in the case of any other breach of contract, and this remedy may be asserted against the bank as a unitary institution. It is essential to note, however, that the depositor's remedy arises only upon a breach of the contract of deposit; further, that the remedy is for damages, and not to enforce payment of the debt. Thus, the "deposit" in a foreign branch is never collectible anywhere but at that branch. If the bank should default in its obligation to pay at that branch then a cause of action arises, not to collect the deposit, but to recover damages for breach of the contract.

That cause of action may be asserted against the bank at its home office. The nature of that cause of action, however, must be recognized. Neither the depositor nor anyone claiming through him has any right to enlarge the obligations of the bank by requiring payment at a different place and in a different currency from that specified in the deposit contract.

The place of payment of a deposit contract and the currency in which the deposit is payable are the essence of the contract. An insurance company cannot be obliged to pay death benefits until the insured has died nor to pay the value of a cargo unless the cargo is lost; a trustee cannot be obliged to pay the remaindermen before the life estate has run its course. A merchant who has contracted to deliver coal in Pennsylvania cannot be required to deliver an equivalent value of diamonds in Amsterdam.

The consequence of this proposition is that unless there has been an unexcused default by the foreign branch in

meeting its local obligations, depositors in such branch have no right of action at all against the bank as a unitary institution and the depositor cannot assert a tenable cause of action against the bank at its home office or elsewhere. Finally, as the foreign branch account has its situs at the location of the branch and as the obligation of the bank cannot be enlarged without its consent, the cases uniformly hold that creditors, assignees, successors, or others taking through the depositor, can neither attach nor levy upon such accounts at the head office.

A. The depositor at a foreign branch has no rights against the bank in New York. The law recognizes the facts. The right of a depositor in a foreign branch (his "property") is to be repaid at that branch in the currency which he has on deposit with that branch; he has no right to force the bank into an arbitrary foreign exchange contract. Thus, the law, and it is substantive law, has long been clear that a bank is not answerable at its head office on a deposit contract made at a foreign branch, unless that foreign branch has defaulted in its obligation of repayment at its own counters.

It is immaterial whether the foreign branches be treated as if they were separate entities or whether they be regarded as integral parts of a corporate whole. The obligation which the bank, as a whole, undertakes when it opens an account at its foreign branch, is to pay at that branch and at that branch only.

Only where there has been a demand and wrongful refusal at the foreign branch can the depositor maintain an action against the head office. *Sokoloff v. National City Bank*, 239 N. Y. 158, 145 N. E. 917 (1924); 250 N. Y. 69, 164 N. E. 745 (1928). Thus, creditors, and others whose

claims derive from the depositor, have no rights against the head office with respect to a foreign branch deposit. The opinion of the court below included an analysis of the "consistent line of authority holding that accounts in a foreign branch bank are not subject to attachment or execution by the process of a New York court served in New York on a main office, branch or agency of the bank." (R. 41-46).^{*} The petitioner's effort to distinguish these cases is futile.

The statements in footnote 13 on page 29 of the petitioner's brief are neither relevant to the legal issue nor are they justified by the record. The uncontradicted evidence in the record is that Omar, S.A. was not known to the bank in New York, and did not have an account at the head office or any domestic branch. (R. 23) The only references to respondent in the petitioner's motion papers are contained in two quotations from the records of brokerage houses, one indicating issuance of a check to respondent (R. 19), the other showing a wire transfer to respondent's Montevideo branch for account of Omar (R. 18). There is absolutely no evidence and no suggestion that respondent in New York played any part in these transfers, or had

^{*} See e.g., *McCloskey v. Chase Manhattan Bank*, 11 N. Y. 2d 936, 183 N. E. 2d 227 (1962); *Varga v. Credit-Suisse*, 2 A. D. 2d 596, 157 N. Y. S. 2d 391 (App. Div., 1st Dept. 1956); *Clinton Trust Co. v. Compania Azucarera Central Mabay, S. A.*, 172 Misc. 148, 14 N. Y. S. 2d 743 (Sup. Ct., N. Y. Co. 1939), *aff'd without opinion*, 258 App. Div. 780, 15 N. Y. S. 2d 721 (1st Dept. 1939); *Gonzalez v. Pardo*, N. Y. L. J. Nov. 30, 1950, p. 1380, col. 5 (Sup. Ct. N. Y. Co., 1950); *Newtown Jackson Co. v. Animashun*, 148 N. Y. S. 2d 66 (Sup. Ct. Nassau Co., 1955); *Cronan v. Schilling*, 100 N. Y. S. 2d 474 (Sup. Ct. N. Y. Co. 1950); *Walsh v. Bustos*, 46 N. Y. S. 2d 240 (City Ct., N. Y. Co. 1943); *Bluebird Undergarment Corp. v. Gomez*, 139 Misc. 742, 249 N. Y. Supp. 319 (City Ct., N. Y. Co. 1931).

These cases are entirely consistent with 12 U. S. C. 604, which requires respondent to "conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office."

any knowledge that they were made. And this is so, even if these transfers were made through respondent's head office (and there is nothing in the record to suggest this was the case) because the remitting bank was acting for Lehman Bros. and Lazard Freres and not for Omar. (See *Erb v. Bancò di Napoli*, 243 N. Y. 45; 152 N. E. 460 (1926); 7 Zollman, Banks and Banking, Section 4753).

The Second Circuit accurately recognized that the doctrine enunciated in the New York cases is founded upon sound policy justifications, and quoted with approval the opinion in *Cronan v. Schilling*.

"Unless each branch of a bank is treated as a separate entity for attachment purposes, no branch could safely pay a check drawn by its depositor without checking with all other branches and the main office to make sure that no warrant of attachment had been served upon any of them. Each time a warrant of attachment is served upon one branch, every other branch and the main office would have to be notified. This would place an intolerable burden upon banking and commerce, particularly where the branches are numerous, as is often the case." *Cronan v. Schilling*, 100 N. Y. S. 2d 474, 476 (Sup. Ct., N. Y. Co. 1950) (R. 43).

B. The petitioner can only exercise the rights of Omar.

The purpose of this action is to seize property of Omar in satisfaction of taxes assessed against Omar. Any rights or claims which petitioner has or asserts against respondent necessarily derive from Omar. Consequently the case presents a typical illustration of a proceeding to distrain property of a defendant in the hands of a third party, whether the order the court issues is labeled attachment, garnishment, levy, execution, capias in withernam,—or injunction. The petitioner has conceded that the relief it

seeks in this action "is the federal tax statute's analogy of garnishment and attachment. *United States v. Eiland*, 223 Fed. 2d 118, 121 (4th Cir. 1955)." (Pet. Main Brief in Court of Appeals, p. 20).

Harris v. Balk, 198 U. S. 215 (1905), upon which the petitioner places great and misplaced emphasis, clearly demonstrates that the right of garnishment is dependent upon the right of the primary creditor to bring action against the garnishee-debtor at the place of garnishment.* The obligation of the garnishee-debtor is not enlarged by the garnishment and a defense of the garnishee-debtor which would be good against its creditor is a good defense in the garnishment proceedings. The court of appeals correctly applied *Harris v. Balk* when it observed that:

"The nature of garnishment proceedings is such that the garnishor obtains no greater right against the garnishee than the garnishee's creditor had. [citations omitted]. Thus, only if Omar could sue [respondent] in New York to recover his deposit, can the Government, as Omar's creditor, sue in New York." (R. 40).

It is clear in the instant case that Omar has no right against the respondent in New York. The obligation, if any, which the bank undertook with respect to Omar was to pay foreign currency at a foreign branch; this obligation

* This rule and this interpretation of *Harris v. Balk* represent the law today. *The Copperfield*, 7 F. 2d 499 (S. D. Ala. 1925), *aff'd*, *sub nom. Aktieselskabet Dea v. Wrightson*, 26 F. 2d 175 (5th Cir. 1928), *cert. den.* 278 U. S. 623 (1928) and *Schlaefser v. Schlaefser*, 112 F. 2d 177 (D. C. Cir. 1940) (dictum), cited by petitioner at pages 27-28 of its brief, neither alter nor erode the principle. In *The Copperfield*, the court's decision was based, *inter alia*, upon a state statute which expressly authorized the proceeding,—in contrast to New York law which unequivocally prohibits this proceeding. In *Schlaefser*, the determinative reason for the court's decision was that all parties had appeared and submitted to the jurisdiction of the court.

is not enlarged because the respondent is found in New York. The petitioner is totally wrong in its assertion (Pet. Br., pp. 26-28) that an attaching creditor can sue the garnishee-debtor wherever he can be found.

C. The petitioner has no right to alter and enlarge the obligation which respondent has undertaken to its customer. Reduced to its essential brutality, the petitioner's demand is that the bank make payment to it in New York whether or not the bank would be obliged so to make payment to Omar. That respondent holds in New York no *res* belonging to Omar is clear. That Omar has no right to claim payment in New York of any hypothetical debt created by a deposit at one of the respondent's foreign branches is equally clear.

The fact that the petitioner is the Government does not create any substantive rights; it does not alter or expand the respondents' obligation. It may well be that federal law can give to the Government a remedy where no remedy is available to a private citizen but federal law cannot create property in New York when none exists here; and the demands of Government, however ruthlessly pressed, cannot impose upon the respondent an obligation which the respondent never undertook. "It would be most unfair that a third person, merely by reason of his interposition, whether he was a sovereign or not, should be able to change the rights inter sese between the obligor of the chose in action and his obligee, who is the objective of the levy or attachment." *United States v. Bank of United States*, 5 F. Supp. 942 (S. D. N. Y. 1934).

In the words of Mr. Justice Holmes:

"A suit in this country is based upon an obligation existing under the foreign law at the time when

the suit is brought, and the obligation is not enlarged by the fact that the creditor happens to be able to catch his debtor here." *Deutsche Bank Filiale Nurnberg v. Humphrey*, 272 U. S. 517, 519 (1926).

It must be noted, too, that in the particular circumstances presented in this case the petitioner's effort to enlarge the obligations of the respondent will result in exposure of respondent to multiple liability. For a more extensive discussion of this factor, see *infra*, pp. 26-30.

In the face of all relevant authority, the petitioner has persistently maintained that it can rise above the substantive limitations upon the rights of allegedly delinquent taxpayers against third parties, and in support of that proposition the petitioner evidently considered one case so convincing as to warrant its reproduction in full in an appendix to its reply brief on petition for certiorari in this case. That case, *Equitable Life Assurance Society of U. S. v. United States*, 331 F. 2d 29 (1st Cir. 1964), also cited at pages 24 and 30 of petitioner's brief on the merits, is in fact firm authority for our contention that the petitioner cannot vary the substantive terms of the respondent bank's obligations towards Omar. In the *Equitable* case the First Circuit found that the Government's tax lien could be enforced against the cash surrender value of a life insurance policy notwithstanding the taxpayer's refusal to surrender the policy—a condition precedent to the taxpayer's right to claim the cash surrender value. The court noted, however, that:

"The provisions for physical surrender of the policy in connection with obtaining the matured value is a mere housekeeping matter to permit the company to tidy up

its affairs. . . . *This is not to voice disagreement with the principle that in matters of substance the government's lien cannot rise above the rights of the taxpayer.*" 331 F. 2d at 33. (emphasis added)

As we have repeatedly pointed out, and as the court of appeals held in this case, the essential characteristics of a bank account are that it is an undertaking that the bank will, upon the taxpayer's special demand, repay to the depositor a like kind and amount of currency at the bank's office where the account is maintained. These are not mere housekeeping details but are the very substance of the bank's contractual obligation; they may not be varied at the option of third-party creditors of the bank's customer, whether those creditors be tax-collectors or tradesmen.

III.

The presence of the respondent within the district confers no equitable jurisdiction upon the district court to enjoin the respondent from the performance of obligations lawfully incurred and performable by it in foreign countries.

There is no real issue as to the fact that the foreign branch accounts are property with a situs in a foreign country which provide the district court with no jurisdiction in rem or quasi in rem. On this point, the issue lies between the executive and the judicial branches of government, for neither the district judge nor the judges who joined in the dissent below accepted petitioner's argument that these accounts were property subject to levy in the United States. Neither is there any question at all that petitioner asserts no claim in personam against respondent.

This case really reduces therefore to the question, whether the court may use the provisional remedy of injunction when it has no jurisdiction to enter a final order of distraint.*

A. The equitable remedy of injunction may only be used to achieve an equitable result. We do not dispute that the court has power over the bank's head office. But power must not be equated with authority. A federal court exercising the extraordinary powers of equity has no right to use those powers toward an improper end.

"There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing an injunction; it is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatened

* An injunction anticipates, but cannot exceed, the ultimate sanction which the court is authorized to impose. The extraordinary power of a district court to issue preliminary injunctions should only be exercised upon a showing that the prospect of the applicant's ultimate success is so great that the ultimate sanction of the court may be accelerated.

Hall Signal Co. v. General Ry. Signal Co., 153 Fed. 907 (2d Cir. 1907);

Yonkers Raceway v. Standardbred Owner's Ass'n., 153 F. Supp. 552 (S. D. N. Y. 1957);

Nadya, Inc. v. Majestic Metal Specialties, 127 F. Supp. 467 (S. D. N. Y. 1954).

In none of the approximately 50 cases we have found which cite *Hall*, culminating in *H. E. Fletcher Co. v. Rock of Ages Corp.*, 326 F. 2d 13 (2d Cir. 1963), is there dissent from its holding that:

"It is a cardinal principle of equity jurisprudence that a preliminary injunction shall not issue in a doubtful case. Unless the court be convinced with reasonable certainty that the complainant must succeed at final hearing the writ should be denied." 153 Fed. at 908.

so as to be averted only by the protecting preventive process of injunction; but that will not be awarded in doubtful cases, or new ones, not coming within well established principles; for if it issues erroneously, an irreparable injury is inflicted, for which there can be no redress, it being the act of a court, not of the party who prays for it". *Bonaparte v. Camden*, 3 Fed. Cas. 821, 827 (No. 1617) (C. C. N. J. 1830).

See also, *In re Dunkly*, 64 F. Supp. 184 (N. D. Cal. 1946).

The relief sought by the petitioner against the bank is unprecedented and excessive. The effect of petitioner's demands would be to invoke the equity power of the district court to force a bank into service as an uncompensated international marshal and to send it on an overseas mission in aid of the Internal Revenue Service's extra-territorial adventures. Consider the example, distressingly similar to the facts at bar, of "a simple order, confined to a direction to [the bank]" (R. 50) to have its foreign branches seize Omar's officers anywhere in the world should they appear at the counters of the branch and to hold those officers until Omar pays its taxes. While the court may have the power to compel such a perversion of due process, presumably by incarcerating all the bank's officers found in New York, no one can deny this would be an improper use of an equitable remedy.

In this case, the petitioner seeks to conscript the bank for performance abroad of acts on behalf of the petitioner which the petitioner cannot itself perform. It seeks to impose this servitude by invoking the district court's power over officers of the bank located in New York, heedless of the penalties which will be imposed in the countries in which

the acts are to be performed. See, *infra*, pp. 26-30. This is an abuse of equitable power:

"We realize that a court of equity having personal jurisdiction over a party has power to enjoin him from committing acts elsewhere. But this power should be exercised with great reluctance when it will be difficult to secure compliance with any resulting decree or when the exercise of such power is fraught with possibilities of discord and conflict with the authorities of another country". *Vanity Fair Mills v. T. Eaton Co.*, 234 F. 2d 633, 647 (2d Cir., 1956).

The argument made by the petitioner with respect to its ability to secure in personam jurisdiction over Omar is both premature and inappropriate. It is immaterial whether or not Omar is before the court.* Even if Omar had appeared in this action or otherwise acquiesced in the jurisdiction of the district court, it would be inappropriate to use the equitable powers of the court to alter or enlarge the obligation undertaken by the respondent. It is not necessary, however, to deal with this question for the fact is that neither at the time the injunction was issued nor at the present time does the district court have jurisdiction over the person of Omar.

The petitioner has set forth a fanciful array of theories as to how it may, at some future date, be able to acquire in personam jurisdiction of Omar. In essence the petitioner reaches for a section of the New York Civil Practice Law and Rules which became effective September 1, 1963, nearly a year after the issuance of the order in question. We have

* The court of appeals found that Omar's absence was significant, but only in terms of distinguishing one case, *United States v. Ross*, 302 F. 2d 831 (2d Cir. 1962) (Pet. Br. p. 11). Omar's absence was not, as petitioner suggests, the *sine qua non* of the decision.

no indication that any steps have actually been taken in reliance upon this statute. The application of this state law, describing the in personam jurisdiction of state courts over non-domiciliaries of the state, is questionable indeed in its reference to the case at bar, which is an action in a federal district court brought under a federal statute for the purpose of collecting a federal income tax from a party who is not only a non-domiciliary of the state in which the district court sits but is a non-resident alien of the United States. Basic questions exist as to the availability of this statute to the Internal Revenue Service in a case such as the one at bar and indeed as to the constitutionality of the state statute itself in its application to a non-resident alien of the United States. We note in passing that such decisions as *McGee* and *International Shoe** were in cases in which the defendant was a resident of the United States; in other words, any expansion of state jurisdiction has occurred within the framework of our federal system where the judgment of each state is entitled to full faith and credit in the courts of every other state. The situation is critically different where the Law of Nations and comity are to be applied, rather than the internal laws of a federal union, bound by the mandate of full faith and credit.

Nevertheless, it is quite evident that even if the district court should assert in personam jurisdiction over Omar by reason of the New York "long-arm" statute or some other legal fiction, it would still be unable to enforce its decree against Omar. Further, as it cannot enforce its decree against Omar, it cannot protect the respondent against multiple liability in other jurisdictions. This inability to pro-

* *McGee v. International Life Insurance Co.*, 355 U. S. 220 (1957); *International Shoe Co. v. Washington*, 326 U. S. 310 (1945).

tect its own decree and to protect innocent parties such as the respondent, who may act in accordance therewith, distinguishes the case at bar from *United States v. Ross*, 302 F. 2d 831 (2d Cir. 1962), and similar cases relied upon by petitioner.

B. A court of equity will not make a decree which it cannot enforce nor will it require performance when it cannot protect those who act in compliance with its order. The injunctive power should be severely restricted when it is used against a party other than a principal actor. See *Eighth Regional War Labor Board v. Humble Oil and Refining Co.*, 145 F. 2d 462 (5th Cir. 1944), *cert. den.* 325 U. S. 883 (1945). In cases upon which the petitioner has evidently relied it must be noted that the party required to perform an act beyond the jurisdiction of the court was the very party against whom affirmative substantive relief was requested. Compliance with such an order created no possibility of the imposition of double liability on the actor. In the case at bar, the petitioner's assertion that if respondent "complies with the district court's order, respondent . . . will presumably incur no liability" (Pet. Br. p. 33) can only be regarded as frivolous. The petitioner presumes that the court's order will be a "recognized defense" to an action by the depositor for breach of the deposit contract (*loc. cit. supra*). In Appendix A hereto we set forth opinions of counsel in six countries where the bank maintains branches. These opinions of counsel in London, Paris, Milan, Montevideo, Bogotá and Mexico City, which were before the court below, all show that the district court's order would not constitute a defense to an action against the bank in those localities.

The district court recognizes, indeed the petitioner admits, that the respondent cannot properly be required to engage in a violation of law in the countries where its foreign branches are permitted to do business. Whether this violation of law results in a criminal or civil liability is immaterial. To be mulcted in damages may be more painful than to pay a small fine; a reprimand or suspended sentence may be insignificant when set against the loss of a reputation for integrity in business built up over many decades.

The mere possibility of multiple liability is sufficient warrant for denial of the injunction. In *Martin v. Nadel* a judgment creditor sought a garnishee order against the London branch of a German bank on the ground that a deposit with the Berlin branch was a debt due from the bank to the judgment debtor. The court stated:

"... It appears to me to be clear that a garnishee order is of the nature of an execution, and is governed by the *lex fori*; and by international law an execution which has been carried into effect in a foreign country under foreign law, and has taken away part of a man's property, is not recognized as binding. There can be no doubt that under the rules of international law the Dresdner Bank could not set up, in an action in Berlin, the execution levied in this country in respect to this debt. If we consider the converse case it is clear, to my mind, that we should take that view of a similar transaction occurring abroad.

• • • • •

"... I must therefore decide this case on the ground that it would be inequitable to order the bank to pay the money to the execution creditor when that payment would leave them still liable to an action to recover the same debt brought in a competent Court at the

foreign place where the parties reside." *Martin v. Nadel*, [1906] 2 K. B. 26, 29, 30 (C. A.).

That decision has been approved and followed in the two American cases we have found dealing with American garnishees and possible double liability in a foreign country. See 69 A. L. R. 610 (1930). In *Weitzel v. Weitzel*, 27 Ariz. 117, 230 Pac. 1106 (1924), a wife tried to garnishee her husband's employer, the Southern Pacific Railway Company of Mexico, which had offices in Arizona, in order to reach a debt it owed to her husband for wages he earned in Mexico. The employer objected on the ground of possible double liability. The court stated:

"... While it is probable the Mexican courts would take notice of a payment of the debt in Arizona and refuse to compel a second payment, there is no international rule, or law, or treaty, so far as we know, requiring that they give faith and credit to judgments of this country's courts.

.

"... It seems to us, since the services were all rendered in the Republic of Mexico for a corporation whose plant is entirely in that country, and since the debt was made and payable therein, the company ought not to be compelled to pay such debt to an Arizona creditor when it is not only possible but probable it would have to pay it again." 230 Pac. at p. 1108.

See also, *Parker, Peebles & Knox v. National Fire Ins. Co.*, 111 Conn. 383, 150 Atl. 313 (1930).

Nor does it matter that the claimant is the Internal Revenue Service seeking to levy on a debt owed to a delinquent taxpayer. In *United States v. Winnett*, 165 F. 2d 149 (9th Cir. 1947), the court stated: "The equities in this case are clearly with Winnett [the garnishee]. He should not be

required to pay the same debt twice even though the interposition here is by the sovereign." 165 F. 2d at p. 151.

The district court cannot protect the bank against multiple liability. Outside the United States the decrees of the district court are not entitled to full faith and credit. It is a rule of international law, accepted and enforced in the United States, that the courts of one country will not enforce or give effect to the tax claims of another. Thus, the decree of the district court is not entitled to comity among nations, let alone full faith and credit.

A recent Canadian case sharply illustrates the limitations on the petitioner's right to extra-territorial enforcement of its revenue laws. *United States v. Harden* involved a suit in British Columbia by our Government upon a tax judgment rendered by the United States District Court for the Southern District of California. Action had been brought by the Government in that court under assessments of the Commissioner of Internal Revenue. The defendant appeared and answered. A settlement was reached before trial and the defendant consented to the entry of a formal judgment in the amount of \$602,110.79. The Government brought an action on that judgment in the Supreme Court of British Columbia and the defendant moved to dismiss on the ground that the court had no jurisdiction to enforce directly or indirectly the revenue laws of a foreign state. The motion was granted and unanimously affirmed by the British Columbia Court of Appeal, and then was unanimously affirmed by the Supreme Court of Canada. *United States of America v. Harden*, [1964] D. L. R. 2d 721, [1963] Can. Exch. 336 (63-2 U. S. T. C. ¶9768).

The principle that the courts of one country will not enforce or give effect to the fiscal or penal claims of other countries is a rule of international law which is a part of the law of the United States.

Banco Nacional de Cuba v. Sabbatino, 376 U. S. 398, 413-14 (1964).

Banco do Brasil, S. A. v. A. C. Israel Commodity Co., Inc., 12 N. Y. 2d 371, 190 N. E. 2d 235 (1963), *cert den.*, 376 U. S. 906 (1964).

The susceptibility of a party to punishment does not justify a court in abusing its equity powers. Unquestionably, the respondent is present within the Southern District of New York. It is equally clear that the real defendant, Omar, is not present within the district, that Omar has no property or rights to property within the district or the jurisdiction of the district court, and that compliance by the respondent with the order of the district court would expose it to liability abroad, to which the order of the district court would not be a defense. In these circumstances, it is clear that the district court had no right to issue an injunction. As the court below said (R. p. 40):

"*Hanson v. Denckla*, 357 U. S. 235 (1958) made explicit what had been assumed since *Pennoyer v. Neff*, 95 U. S. 714, 733 (1877), namely, that a state has no right 'to enter a judgment purporting to extinguish the interest of such a person [over whom it has no personal jurisdiction] in property over which the court has no jurisdiction,' 357 U. S. at 250." (R. 40).

The court of appeals properly held that the district court could not, through the device of a provisional remedy, achieve a result proscribed by this Court in *Hanson v. Denckla*.

IV.

The decision of the court below comports with sound reason and public policy. The arrogation of power demanded by the petitioner would cause irreparable damage to the banking system and foreign commerce of the United States with no compensating benefit to the Internal Revenue Service.

The petitioner does not and cannot deny that this case evidences the first effort to enforce tax penalties against a non-resident foreigner by distraint on accounts maintained at the foreign branches of a United States bank. The petitioner does not and cannot deny that the novel procedure would damage the banking system; it attempts only to persuade the Court that the hurt will not be intolerable.

The fact is that to indulge petitioner in its demand for extra-territorial powers would cause irreparable damage to the national interest. The area of damage extends beyond the immediate interest of the banks. A declaration that United States courts will cause the "freezing" of deposits in the foreign branches of American banks would unmistakably seriously impair, if not destroy, the ability of United States banks to compete abroad; to the extent that the "freezing" program was implemented, American banks would be subjected to loss consequent upon the breach of their contractual obligations in foreign countries; it would result in a withdrawal of foreign currency deposits which inescapably would cripple the ability of American banks to finance the foreign commerce of the United States; it would thus immediately and adversely affect the United States balance of payments; it would necessarily open the door to invasion of the sovereignty of the United States through the assertion of corresponding rights by foreign

governments; and, perhaps worst of all, it would degrade the reputation of the United States as a nation operating under law rather than expediency.

The record is devoid of facts, or even optimistic speculation, as to the volume of money which might, through the use of petitioner's proposed new device, flow into the coffers of the United States, whether from the pockets of delinquent taxpayers or of innocent banks. It is evident, however, that in precise measure as our government impairs the ability of American banks to attract and maintain foreign currency deposits, the practical possibility of collection will diminish. Indulgence of petitioner's demands would not only be bad law, it would be a bad bargain.

A. The court below correctly assessed the policy issue. Examining the position urged by the petitioner, the court below came to the reasoned conclusion that it would "lead only to harmful consequences for our banking system abroad without any concomitant benefits here at home", (R. 48). There can be no doubt that adoption of the proposal urged by the petitioner would have serious adverse effects upon the American foreign banking system and thus upon the foreign commerce of the United States which that system serves. The area and depth of this detriment is evidenced by the concern which has led the respondent's American competitors to appear as *amici curiae*; it has been reflected by the dismay of those concerned with the well-being of the American commercial community.*

* "The future of American foreign banking is more important than collection of a few million dollars of somebody's delinquent taxes—if indeed they ever can be collected."

Editorial, The Journal of Commerce and Commercial (New York, N. Y., June 11, 1964).

B. The only significance of the new Treasury regulations is that they evidence recognition of the harm to the banking system. In apparent recognition of the injurious effects on the foreign banking community of the use of process here to reach accounts abroad, the Treasury announced new regulations relating to the collection of taxes "from any deposits held in a foreign office of a bank engaged in the banking business in the United States". These regulations were announced on the day the petition for certiorari was filed in this case. They assume a power which, so far, the courts have uniformly held the Commissioner of Internal Revenue does not have; and they were promulgated in evident defiance of the decision of the court of appeals in this case.

These regulations purport to be a self-imposed restriction upon the use of process to reach foreign bank accounts to collect taxes; and they are now put forward by the petitioner as justification for the extraordinary remedy pursued in this case, apparently for the first time.

Every tax levy contains an injunction and, so far as intangibles are concerned, a tax levy can only be enforced against a third party by enforcement of the injunction. Chaos would result, if every tax levy served on a bank with foreign branches were to apply to deposit accounts maintained all over the world.* This is so evident that the regulations would limit the use of process against foreign bank accounts to those cases where the Commissioner believes (1) that the taxpayer is within the jurisdiction of the court at the time the action is authorized or sanctioned,

* The respondent alone is served with approximately 2,000 Federal tax levies each year.

or (2) if the taxpayer is not within the jurisdiction of a United States court at that time, that the foreign deposits "consist, in whole or in part, of funds transferred from the United States . . . in order to hinder or delay the collection of a tax . . ." Treasury Regulations on Procedure and Administration (1954 Code), 26 C. F. R. §§ 301.6332-1, 301.7401-1.

The significance of the Regulations lies in the fact that they evidence an awareness of the injury to the American banking system inherent in the position for which the petitioner contends; moreover, they indicate an awareness of the disadvantage to the national interest, for the foreign branch banks in question are not only those of American banks, but the foreign office of any bank doing business in the United States. The restraint which the petitioner is prepared to impose upon itself in the exercise of the power it requests is most certainly not dictated by concern for the tax delinquents whom it pursues. The concern can only be for the damage done to innocent and productive United States interests.

The Regulation, however, is entirely inconsistent with principle. Quite obviously, the validity of the permissive sections of the regulation depends upon the concept that courts in the United States have the power to reach foreign deposits, whether that power is named attachment, garnishment, execution, levy, injunction, or as the petitioner characterizes it, "freezing". If this power does exist, then it is difficult to see why it should not be exercised in respect of any tax delinquent. If, as we contend, it does not exist, then vitality cannot be breathed into it by reason of the tax delinquent's intent to frustrate the tax collection process.

It is to be noted that the Regulation reflects the argument made in petitioner's brief to the effect that the injunctive power is necessary in order to prevent the dissipation of the delinquent's assets by their removal beyond the power of the United States. The fact is that once the assets have been removed, they are outside the jurisdiction of the United States and beyond the grasp of the tax collector. The fact that the delinquent taxpayer thereafter establishes an account and makes deposits in the foreign branch of an American bank, rather than in the foreign branch of a local or other non-United States bank, has nothing to do with the exodus of assets from the jurisdiction.

No one can quarrel with the concept that the Treasury should have plenary rights to prevent a non-resident tax delinquent from removing dollars or other property from the United States; indeed, such powers now existing within the scope of law were properly and effectively exercised in the case at bar to "freeze" accounts with Lehman Bros. and Lazard Freres in New York City. The problem is that the petitioner would equate the power to arrest with the power to extradite, if the fugitive asset, or its proceeds, is at some time believed by the Commissioner to be found in a foreign branch of an American bank.

The petitioner is obliged to recognize (Pet. Br. p. 7) that the proposed Regulation had no application to the case at bar; it is quite frankly put forward as a palliative for the injury which petitioner recognizes will ensue from the exercise by it of the power it seeks. A promise to use self-restraint in the future is offered to the court by the petitioner as a sort of bargain to persuade the court to grant power where it has never existed before. It is not sufficient here. So long as the United States asserts the right to

sequester property in the foreign branches of American banks whenever an official in Washington believes it is appropriate to do so, the competitive disadvantage to the American banks, the starvation of the financial arteries which nourish American foreign trade, and the pressures on the United States balance of payments will continue. The deal which the petitioner has offered in these regulations is not acceptable. Even if it mitigates the injury to the national interest in some particulars, what remains is insupportable. The position urged by the petitioner, even diluted by the new Regulation, is adverse to the national interest. The injury, in the words of mortally wounded Mercutio, may be "not so deep as a well, nor so wide as a church door, but 'tis enough . . ."

C: The deposit gathering function of the foreign branches is of vital importance to the United States economy. The foreign branches of American banks are recognized as important participants in the international economic policy of the United States. They facilitate the foreign trade and commerce and investment of the United States through the provision of financial services and through financing American business overseas by loans and credits. The most vital aspect of their operations is their unique ability to assemble local capital for these purposes instead of depending upon an outflow of United States capital. The local deposits of these branches defend the international position of the United States dollar. The foreign branch must have a source for the funds which it uses in its business. If it is handicapped in its ability to obtain these funds through the medium of local deposits, it must tap the United States dollar capital of the bank as a whole, or it must go out of business.

D. The frivolous use of injunctive power does irreparable damage to the bank. Quite apart from any loss of existing deposits or inability to compete for new deposits, the application of the court's injunctive power with respect to deposits at foreign branches will result in an immediate loss to the bank which cannot be less than the amount of the deposit but may run into extended consequential damages. We must confess that, long range, this damage to the banks will probably be minimized because the threat occasioned by reversal of the instant decision will inevitably eliminate from the books of the foreign branches not only those persons who are, but those persons who might conceivably be, delinquent in acceding to the tax demands of the United States. Thus with the disappearance of the deposits which the petitioner seeks to distrain there will undoubtedly be a corresponding lessening of the bank's exposure.

E. Reversal of the decision below would involve repudiation of fundamental judicial policies. The court below recognized that "the rule suggested by the Government would have to work both ways . . . it is inconceivable that the issuance of an injunction by a court of a foreign country against an American branch bank affecting the accounts or activities of the head office in the United States would be looked upon with favor." (R. 48-49). It is a fundamental judicial policy, in the United States as in other countries, that the courts will not enforce or give effect to the fiscal or penal claims of other countries. Yet, adoption of the rule urged by petitioner would mean that the taxing authorities of Lebanon could "freeze" the account of a United States citizen at respondent's head office in New York City, by serving upon respondent's branch in Beirut an order directing such action. It must be noted, too, that

this result would obtain even though the United States citizen had never set foot in Lebanon; under the rule urged by petitioner, the *ex parte* assessments of the Lebanese Government would have to be treated as a "global lien" intruding upon the sovereignty of the United States.

Conclusion

The hope of temporary advantage in the pursuit of a single claim should not outweigh fundamental principles of law long established to safeguard fair dealing. Those who use the strong arm of equity against a malefactor must be sensitive lest it injure the innocent.

THE JUDGMENT OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT SHOULD BE AFFIRMED.

Respectfully submitted,

HENRY HARFIELD

Attorney for Respondent

20 Exchange Place

New York, N. Y. 10005

SHEARMAN & STERLING

WM. HARVEY REEVES

HERMAN E. COMPTER

JOHN E. HOFFMAN, JR.

Of Counsel

September 25, 1964

APPENDIX A

At our request, a number of First National City Bank's foreign branches submitted the following question to local counsel for an opinion under the laws of the host country:

"Assume that the local branch of First National City Bank refuses to honor the demand of a depositor for payment of the credit balance in his account, and that the depositor brings an action against the bank for such refusal:

1. Would the courts of [name of country] recognize as a defense that the refusal to pay was based upon an injunction order issued by a court in the United States?
2. Would your answer be affected if the injunction order were issued in an action brought by the United States to collect taxes from the depositor?"

The branches solicited were the following:

London
Paris
Milan
Montevideo
Bogotá
Mexico City
Karachi

There follow the opinions received from all branches except Karachi. These opinions were before the court of appeals on the en banc rehearing.

Karachi had not responded by the time of the rehearing. Since an opinion of Pakistani counsel would go beyond the material before the court of appeals we did not consider it appropriate to follow up the inquiry to Karachi.

LINKLATERS & PAINES

OF SAN H BROWN
KENNETH D COLE

PARTNERS

ANDREW J KNOX F F H CHARLTON
W J SANDARS ARNOLD G C LLOYD
WILLIAM L ADDISON JOHN H CARPILL
PETER G BENHAM A JOHN B FORDYCE
JOHN H FIELD HENRY R JAMES
JOHN W GAUNTLETT HENRY S R MCINTYRE
RAYMOND S L SHIBBLES HARRI H SHEDDEN
P M CHRISTOPHERSON HUGH W W PAINE
JOHN W NAYO DAVID C F PEARSON

ASSOCIATES

G A E BUCK D BAROUMOS

YOUR REF

OUR REF WLA

BARRINGTON HOUSE,

59-67, GRESHAM STREET,

LONDON, E.C.2

TELEPHONE: MONARCH 7080 (20 LINES)

TELEX: 281445

TELEGRAMS: LINKLATERS, LONDON. TELEX:

CARLOS: LINKLATERS, LONDON, E.C.2

30th September, 1963.

R.J. Breyfogle, Esq.,
First National City Bank,
117, Old Broad Street,
London, E.C.2.

Dear Bob.

Thank you for your letter of the 27th of this month enclosing a copy of the letter dated 25th of this month from your head office.

The question to which an answer is required is supposing you refused to honour a cheque drawn on your Bank by one of your customers who had a credit balance would it be a defence to you ~~for~~ the Courts in this country to say that you had refused payment because of an injunction issued by a Court in the United States.

The answer to this question is that the contract between you and your customer is an English contract and the debt owing by the Bank to the customer in respect of his credit balance is situated in this country and in these circumstances the relationship is governed by English Law and the decree of a Foreign Court in no way affects the position. This means that it would not be a good defence to you to plead the injunction of a Court in the United States.

I think that what I have written above covers the situation but a further question is posed in the letter of September 25th, namely, would the answer be in any way affected if the injunction order were issued by a Court in the United States to collect tax from your customer. The answer here again is in the negative. In any event the Courts in this country will not directly or indirectly enforce the Revenue Laws of a Foreign country.

I hope that what I have written will be of assistance to you.

Yours sincerely,

William Z. Aldin

5a

LAW OFFICES OF
S. G. ARCHIBALD

10 AVENUE DE MESSIONE
PARIS 8

TELEPHONE LABORDE 05-69
CABLE ADDRESS ARCHIBALD-PARIS

HENRY ARCHIBALD R EDWARDS KER
JOHN J HUTCHINS ANDRE PAZERY

E GROSCLAUDE PIERRE NEIGER
G LECOINTE CLAUDE GRELOUD
M GUINCHARD M C LACHAUD
B LEBRUN S AIGARDI
J DE LA GIRONDAY

ROY ARCHIBALD
COUNSEL

BRUSSELS OFFICE
30 AVENUE MARN
TELEPHONE 12 48
FRED S SCHEUERMAN

October 1, 1963

PRIVATE & CONFIDENTIAL

Mr. Harvey S. Gerry
First National City Bank
60, Avenue des Champs-Élysées
Paris - 8.

Dear Mr. Gerry,

This refers to the letter dated September 25, 1963 from Mr. Frank T. Mitchell of your main office to you, copy of which was forwarded to me.

The said letter inquires first as to whether the Paris branch could successfully argue in a French court that it refused to honour the demand of a depositor for payment of a credit balance in his account on the ground that such refusal to pay was based upon an injunction order issued by a court in the United States. The answer to this question is no.

Under French rules of private international law, an injunction order issued by a foreign court whether during the course of an action (what is known in American law as a "preliminary injunction") or as a result of a judgement must be subject to the procedure called "Exequatur" in order to be enforced in France. This involves in all cases an application by the foreign party concerned to a French court for such enforcement in France.

/cont...

Mr. Gerry

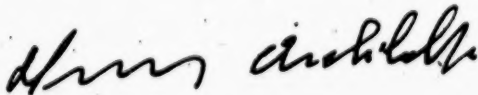
- 2 -

Oct. 1, 1963

It follows from the foregoing, therefore, that the Paris branch of your bank cannot block the account of a depositor so as to satisfy an injunction order by a foreign court unless and until such order has been expressly sanctioned by a French court and notice thereof duly given to your branch according to the rules of French procedure.

The second part of the inquiry contained in the afore-mentioned letter pertained to whether our answer to the first question would be different if the injunction order were to be issued in an action brought by the United States Revenue Authorities to collect taxes from the depositor. The answer to this question is also in the negative. The identity of the plaintiff does not affect the reasoning outlined above.

Very truly yours,



Henry Archibald.

JBG/tb

FIRST NATIONAL CITY BANK**OVERSEAS INTER-OFFICE AIR MAIL LETTER**Private & Confidential

To: Mr. F.T. Mitchell, Senior Vice President and
Office: Deputy Manager Overseas Division
 Head Office, New York.

Re:**From: MILAN**

Cassa di Risparmio 4978

Milano, Italy

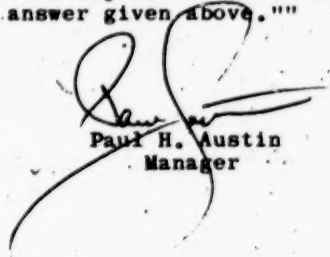
Date: October 1, 1963

In replying please quote: PHA/lm

RECEIVED
 OCT 3 1963
 F. T. MITCHELL
 OVERSEAS DIVISION

Reference is made to your letter of September 25, 1963. The questions set forth in the above letter have been answered by our counsel as follows:

- "1) An Italian Court could not recognize as sufficient motive to refuse payment the injunction order issued by a U.S. Court;
- 2) The reasons for which the injunction order was issued could not affect the answer given above."


 Paul H. Austin
 Manager

ESTUDIO JURIDICO
GUYER & REGULES

FUNDADO EN 1911 POR LOS DRES. MAX GUYER Y CARLOS REGULES

DIRETELE GUYERMAX
TELEFOS 84125 84859 97193

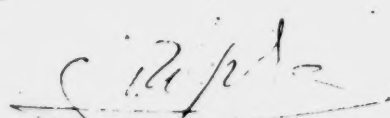
EDIFICIO ARTIGAS RINCON 487
MONTEVIDEO URUGUAY

September 30, 1963

M E M O R A N D U M

Re: Letter dated September 25, 1963
Mr. Frank T. Mitchell to
Mr. Harold M. Weaver, Jr.

- 1) No.- An injunction order issued by a U.S. Court is not applicable in Uruguay unless the injunction is properly submitted and approved by the Suprema Corte de Justicia of Uruguay following the legal requisites required by Uruguayan law.-
- 2) No.- It is irrelevant the person of the plaintiff and the origin of the debt.-


Gilberto Regules

11a

**PAYAN CAMARGO & CIA.
ABOGADOS**

SOCIOS:

GERARDO PAYAN CASTRO
ALVARO CAMARGO PATIÑO
ABOGADOS CONSULTORES:

CARLOS CASAS MORALES
NESTOR JULIO DECEARA
JAIME ORLANDO VELASCO
CARLOS JARAMILLO DE LA TORRE
ENRIQUE APARIZOLA APARIZOLA
LORENZO SOLANO PELAEZ
RAUL MUÑOZ PIEDRAHITA
BERNARDO ESCALLON VARGAS
JOSE MARIA IRAGOYEN V.

OFICINAS EN EL EDIFICIO DEL BANCO DEL COMERCIO
CALLE 19 No. 9-22 - 2º. PISO.
BOGOTA, COLOMBIA

APARTADO AEREO 4306
CABLES: "PAYCAM"
TELEFONOS: } 41-84.27
 } 41-72.24
 } 49.62.2

ANSWER TO POINT 1.

Colombian Courts would not recognize this defense unless the injunction order issued by an American Court has been in turn confirmed by the Colombian Supreme Court, after having followed proper legal procedure to obtain enforcement of a foreign court decision.

RECEIVED

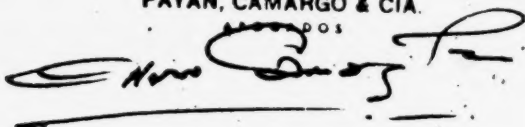
OCT 7 1963

F. T. MITCHELL
OVERSEAS DIVISION

ANSWER TO POINT 2.

The origin of the injunction does not in any way affect our answer.

PAYAN, CAMARGO & CIA.
ABOGADOS



RECEIVED

OCT 3 1963

REFERRED TO

GOODRICH, DALTON, LITTLE & RIQUELME

APOD. POSTAL 93 BIS BALDERAS 36

MEXICO J. D. F.

TEL. 6-15-30
CABLE GODAL

October 1, 1963.

Mr. J. A. Rivera
First National City Bank
I. la Católica # 54
México, D. F.

Dear Johnny:

Please be referred to our telephone conversation of this morning whereby you submitted the following problems for our consideration:

1. If a depositor requests payment of a credit balance in his account and said payment is refused by the bank due to an injunction order issued by a Court in the United States and subsequently issued by the depositor, would the Mexican courts accept the defense of the bank based on the injunction order?

2. Would your answer be affected if the injunction order is issued with an action brought by the United States to collect taxes from the depositor?

It makes no difference as far as the solution to the problems is concerned if the injunction order is based on a lawsuit filed by the United States government in order to collect taxes or not, and therefore the solution to the two foregoing queries can be resolved as follows:

A sentence or decree handed down by a foreign tribunal can be enforced in Mexico but it is necessary that same be requested by the foreign tribunal through the corresponding diplomatic channels. When the foreign sentence is sent to our Ministry of Foreign Relations, the latter in turn will refer it to the Mexican Supreme Court so that it may be studied by a competent Mexican judge. It is absolutely necessary that the Mexican judge review and authorize the carrying out of the foreign decision in accordance with the principle of absolute sovereignty between nations.

- 2 -

So that a judge may authorize the enforcement of a foreign sentence it is necessary that the requisites set forth in Article 605 of the Code of Civil Procedure be met. These requisites are the following:

1. That the decision be dictated as a consequence of the exercise of an action en persona and not an action en rem, and based on real property located within Mexico.

2. That the defendant has been personally notified of the lawsuit.

3. That the fulfillment of the obligation being sought is lawful in Mexico, that is to say, the Mexican judge must analyze the sentence to see if it is contrary to law or public interest. Should such be the case the judge will deny the carrying out of the sentence.

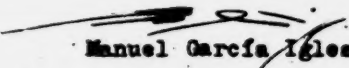
4. That the sentence be final, pursuant to the laws of the nation where issued. When I say "final" I mean that there is not any appeal which may be filed or which has been filed against the sentence.

5. Lastly, that the resolution be duly legalized.

Pursuant to Article 608 of the Code of Civil Procedure, the Mexican judge may not examine or decide on the justice or injustice of the sentence, nor on questions of fact or law but is limited to examining only its authenticity and if the necessary requisites, as set forth above, are met.

In view of the above, I can say that a sentence handed down by a judicial body in the United States can be enforced in Mexico and must be obeyed by a Mexican bank provided the sentence is sent through legal channels and its execution is reviewed and authorized by a Mexican judge.

Very truly yours,


Manuel Garcia Iglesias.

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JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

UNITED STATES OF AMERICA, *Petitioner,*
against

FIRST NATIONAL CITY BANK, *Respondent,*
and

OMAR, S. A., a Uruguayan corporation; LAZARD FRERES & CO.;
LEHMAN BROTHERS; BELGIAN-AMERICAN BANKING CORP.; BEL-
GIAN-AMERICAN BANK AND TRUST CO., and FIRST NATIONAL
CITY TRUST CO.,
Defendants.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

**JOINT BRIEF FOR THE CHASE MANHATTAN BANK, THE
FIRST NATIONAL BANK OF BOSTON AND BANK OF
AMERICA NATIONAL TRUST AND SAVINGS
ASSOCIATION, AS AMICI CURIAE**

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No. 59

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**JOINT BRIEF FOR THE CHASE MANHATTAN BANK, THE
FIRST NATIONAL BANK OF BOSTON AND BANK OF
AMERICA NATIONAL TRUST AND SAVINGS
ASSOCIATION, AS AMICI CURIAE**

Opinions Below

The opinion of the United States District Court is reported at 210 F. Supp. 773. The opinion of the United States Court of Appeals for the Second Circuit, and the dissenting opinion, are reported at 321 F. 2d 14. The *per*

curiam opinion of the Court of Appeals, sitting *en banc* on rehearing, is reported at 325 F. 2d 1020.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Government's brief (p. 1).

Question Presented

Whether for the purpose of aiding the Government in collecting taxes allegedly owed by an alien, a United States District Court has the power, by service of process on the head office of an American bank, to order the freezing, and ultimate transfer to the United States, of a debt owed by a foreign branch of that bank, when the alien can collect that debt only at the branch outside of the United States.

Statutes Involved

The pertinent statutes are set forth at pages 38 through 43 of the Government's brief.

Statement

The action was brought by the Government, the petitioner herein, against defendant Omar, S. A., respondent First National City Bank and the other defendants named above. The complaint alleged that defendant Omar was indebted to the United States for unpaid taxes, penalties and interest. It prayed for injunctive relief against respondent and the other defendants, alleging that they held property of Omar encumbered by Federal tax liens. In addition to its prayer for an injunction *pendente lite* order-

ing the defendants to refrain from disposing of Omar's property, the Government sought an order compelling those defendants to return all property and property rights of Omar, including any sums held abroad for the account of Omar in foreign branches of defendant banks, to the jurisdiction of the United States District Court for the Southern District of New York.

The District Court granted the Government's motion for temporary relief against all defendants (except First National City Trust Co. and Belgian-American Bank & Trust Co. which had shown satisfactorily that they did not hold property of Omar), ordering them to refrain from disposing of any property or rights to property held for Omar's account by defendants or their branches, agents or nominees, whether or not their branches, agents or nominees, were located within the United States.

Respondent appealed from so much of the District Court's order as restrained the disposition of any property of Omar held outside of the United States by respondent's foreign branches. On June 26, 1963, the Court of Appeals sustained the appeal (one Judge dissenting), vacated the District Court's order in part and remanded the case for modification of the injunction. On September 19, 1963, the Court of Appeals granted the Government's petition for a rehearing *en banc*. On January 13, 1964, the Court of Appeals adhered to its prior decision, reversing the District Court, by a vote of 4-3.

Because of the importance of this case to the foreign operations of American banks in general, The Chase Manhattan Bank, The First National Bank of Boston, and Bank of America National Trust and Savings Association sought,

and obtained, the consent of the attorneys for the Government and respondent to submit this joint brief, as *amici curiae*.

Summary of Argument

This case involves serious questions concerning the powers of a United States District Court, as well as important considerations of foreign branch banking and United States foreign economic policy. It is these relevant policy considerations with which the present *amici* wish to deal, in the main.

The Government's brief shows a shift in the legal grounds of its contentions. Legally, its new arguments have no more force than their arguments had below. The new arguments, however, do make the policy considerations against the attempted assertion of power stand out even more forcefully.

Apparently, the Government now recognizes that under the law of New York, controlling in this case, foreign branch deposits are not subject to attachment or execution by process of New York courts, and therefore are not subject to federal tax levy in New York because they are neither "property" nor "rights to property" in New York. The Government now argues that the injunction issued against respondent was no more than an attempt to maintain the *status quo* while the Government seeks personal jurisdiction over the taxpayer. This argument begs the question. Deposits in a foreign branch of an American bank, which deposits are debts of the branch (and only the branch) to its customers, constitute under the law of New York property situated outside the United States for that is where the sole debtor, the branch, is located. Therefore, such deposits are beyond the jurisdiction of a United States Dis-

trict Court sitting in New York, whether the asserted power is attempted to be exercised through enforcement of a lien or through an injunction since process cannot validly be served on the branch-debtor.

Whatever the attempt to exercise control over such funds be labeled, the forceful policy reasons militating against such a purported exercise of jurisdiction remain the same.

ARGUMENT

POINT I

The District Court had no power to issue orders purportedly affecting the disposition of deposit-debts of respondent's foreign branch for it had no jurisdiction over the creditor-customer or the debtor-branch.

As the Court of Appeals explicitly held, the District Court had no power to issue orders affecting the disposition of bank deposits in the foreign branch of an American Bank, which deposits were payable solely at the foreign branch. As shown in the opinion of the Court of Appeals, this holding is amply supported by the law of New York, controlling on this point. In New York, a depositor of a foreign branch of an American bank has no right to obtain payment of the deposit-debt at the bank's domestic office in New York, and thus, the deposit-debt cannot be affected by legal process served in New York for there is no debtor, and thus no debt, in New York.

The Government's brief concedes the essential legal propositions. It concedes that the Government's lien extends only to "property within the district" (Br. pp. 24-25). It concedes that such lien extends only to "such prop-

erty as the taxpayer has or is entitled to under State law" (Br. p. 30). It concedes that under New York law, the situs of a foreign branch bank deposit is solely in the country where the branch is located for it is only at the branch that the depositor can demand payment and, therefore, the only debtor is the branch (Br. p. 21).

Having conceded the vital component propositions, the Government seeks to avoid the inevitable conclusion by dealing in irrelevancies. All of the Government's arguments are defective in that they fail to deal with the fundamental issue—how can a United States court control the disposition of a debt when it does not have jurisdiction over the creditor (Omar) or the debtor (the Montevideo branch). See *Hanson v. Denckla*, 357 U. S. 235 (1958). Thus, for example, the Government in suggesting that it merely wants an injunction against payment of the deposit-debt to Omar to preserve that debt while it attempts to serve Omar (Br. pp. 10-23) neglects to consider the essential fact that the debtor-branch, the only entity with a duty to pay, cannot be served with an order providing for an injunction, temporary or permanent. The authorities cited by the Government are inapplicable for they deal with situations in which the court's judgment, by reason of the court's jurisdiction over the parties or a *res*, controlled the parties and protected them from multiple liability. In the present case, the District Court did not have jurisdiction over the debtor, the creditor or any *res*, and thus, its orders could not protect the debtor-branch in any way.

The Court of Appeals recognized and applied long-established legal principles governing foreign branch deposits and the policy justifications for such principles. It further recognized that whatever the order of the District

Court was denominated (*e.g.*, a garnishment, an injunction), it was repugnant to those principles and their underlying policy. The dissenters in the Court of Appeals, like the Government in its brief, were unable to cite any authority which contradicted those principles in any way.

There is no basis in law for the reversal of the determination of the Court of Appeals. The Government's arguments are no more than short-sighted pleas for extraordinary powers, repugnant to established legal principles and the objectives of sound national policy.

POINT II

Significant policy considerations militate against reversal of the Court of Appeals and sanctioning the broad powers which the Government seeks.

A. Adverse Effects on Foreign Branch Banking and upon American Foreign Economic Policy.

Aside from the purely legal considerations relative to the status of foreign branch bank deposits, this case poses serious questions with respect to foreign branch banking and United States foreign economic policy. The decision of the Court of Appeals is consistent with the aims of that policy.

A contrary decision, authorizing the freezing of customers' deposits in foreign branches of American banks and their ultimate transfer to the United States, would deter the establishment, and continued maintenance, of such foreign branch deposits and, consequently, impair the successful operation of foreign branches. It would, thus, conflict directly with avowed Congressional and Executive

policy of encouraging foreign branch operations. Moreover, it would adversely affect the American international balance of payments.

Congress recognized the vital place of foreign branches in a sound American banking system at the very inception of the Federal Reserve System. The Federal Reserve Act makes explicit provision for the establishment of American banking machinery in foreign countries and, by limiting restrictions to a minimum, affords the broadest opportunity for this type of export of American business.

In 1962, Congress evidenced its continued vital interest in this area through the enactment of P.L. 87-588, 76 Stat. 388 (1962), which amended the Federal Reserve Act to free foreign branches from many of the restrictions on United States domestic banking and to permit them to engage in banking on a par with indigenous institutions. This legislation, designed to improve the competitive position of these branches, was the direct result of a recommendation made by the Board of Governors of the Federal Reserve System. See LEGISLATIVE RECOMMENDATIONS OF THE FEDERAL SUPERVISORY AGENCIES TO THE SENATE COMMITTEE ON BANKING AND CURRENCY, Study of Banking Laws (Comm. Print, 1956), p. 111. The legislative history of P.L. 87-588 demonstrates a clear Congressional policy favoring *effective* foreign branch banking as an instrument to ease the problems of balance of payments and gold outflow. See *S. Rep. No. 738, 87th Cong., 1st Sess.* p. 2 (1961). See also *H.R. Rep. No. 2047, 87th Cong., 2d Sess.* (1962).¹

¹ The Government argues (Br. p. 35) that the legislative history of P.L. 87-588 indicates that "Congress explicitly manifested an intention to prevent these facilities from being used by tax evaders". What the quotation from the House Committee Report says is that the Committee does not believe or intend that the legislation—granting additional powers to foreign branch banks—should offer any opportunities for tax evasion. Moreover, that legislation in no way added to the power of foreign branch banks to accept deposits.

The continued vital role of foreign branch banking in the United States economy has been heavily underscored in recent reports to the Executive Branch. See e.g., ADVISORY COMMITTEE ON BANKING TO THE COMPTROLLER OF THE CURRENCY, REPORT, National Banks and the Future (1962), p. 130; COMMISSION ON MONEY AND CREDIT, REPORT, Money and Credit (1961), p. 212. Such reports noted the value of foreign banking operations in stimulating world trade and investment, in strengthening the American position with respect thereto, and in reducing the drain on dollar funds by enabling American corporations to finance, in part, their own overseas activities through local currency deposits with foreign branches of American banks. The Advisory Committee stated:

"The stimulation of world trade and investment is an important factor in the challenging and rapidly changing world situation of today. With the completed reconstruction of Western Europe, the emergence of the European Common Market, the clear and present needs of the less developed parts of the world and the continuing improvement in world trade and finance, it is in the national interest of the United States to encourage the growth of institutions which will foster world trade and investment. These institutions include Edge Act and agreement Corporations and also foreign departments and branches of United States banks. It is vital that unnecessary and burdensome restrictions on all these types of foreign activities by American banks be eliminated if we are to maintain and strengthen our position in world trade and finance." ADVISORY COMMITTEE ON BANKING TO THE COMPTROLLER OF THE CURRENCY, REPORT, National Banks and the Future (1962), p. 130.

The Committee concluded its discussion of international banking by saying:

"By and large, the cardinal principle which should guide the authorities is the need to insure that U. S.

banks, in their international operations, become *as competitive as possible* and thus help strengthen the American role in the world economy." Id., 133. (Emphasis added)

The fostering of foreign branches of American banks is thus a policy of Congress and the Executive Branch. A decision contrary to that of the Court of Appeals would conflict with those clearly expressed national policies.

In arguing for the immunity of foreign deposits from the kind of assertion of power that the Government is here attempting, the concern of the American banks engaged in international banking is not to protect the "artful tax dodger"—one who through one artifice or another available in the international scene will not be stopped by any *tour de force* concocted in this case. American international banking is, on the other hand, concerned with the many responsible individuals in commercial and industrial establishments abroad who have business contacts with the United States and are repelled by the extraordinary complexities of our tax system. Faced with uncertainty, they may well elect to avoid the risk of unwitting entanglements that might flow from doing business with the foreign branch of an American bank.

The Government argues (Br. pp. 35-37) that the law-abiding foreign depositor will not be dissuaded from using American branch banks because his deposited funds could only be "frozen" if there were a reasonable possibility that he could be lawfully served with process in the United States and because the new Treasury Department Regulation (26 C.F.R. 301.6332-1), issued at the time of the petition for certiorari in this case, supposedly contains limi-

tations on the power of the Internal Revenue Service to institute judicial proceedings to reach foreign branch deposits.¹ The arguments under Point I fully answer this contention. Moreover, if the Government's position (Br. pp. 17-18) as to the reach of new state "long arm" statutes (the constitutional validity of which is unsettled) is supported by the decision in this case, depositors in foreign branches of American banks will have even more reason to fear for their deposits. The damage that could be done to the American balance of payments by full acceptance of the Government's argument before this Court is evident. A recent study has concerned possibilities of encouraging foreign investment in American securities.² It is quite evident that if the Government's claim (Br. pp. 17-18) that any property, wherever located, belonging to a foreigner who has been served with process under the "long arm" statutes can be reached by an order *in personam*, foreigners will be reluctant to invest in America at all. Certainly, the so-called limitations on the authority of the Commissioner of Internal Revenue under the recent Treasury Regulation would be farcical indeed.

The Court of Appeals refused to adopt a rule of law that would be deleterious to the foreign operations of American banks and thus repugnant to the principles of sound economic policy while gaining nothing in terms of tax administration. No other decision would have been reasonable.

¹ Such "limitations" must be viewed with caution for they are self-imposed and may well be abolished if the Secretary should deem it necessary.

² TASK FORCE ON PROMOTING INCREASED FOREIGN INVESTMENT, REPORT (1964).

B. Problems of Foreign Policy and Conflicts of Law Among Nations.

The majority opinion of the Court of Appeals saw clearly the pernicious possibilities inherent in the Government's attempt to give extra-territorial effect to its tax collection efforts.

"In addition, the rule suggested by the Government would have to work both ways. As yet, our courts have been faced only with cases seeking to attach deposits in foreign branches of American banks by service on the home office here . . . and others seeking to attach deposits in foreign banks by service on a branch of such bank doing business in New York. . . . However, it is inconceivable that the issuance of an injunction by a court of a foreign country against an American branch bank affecting the accounts or activities of the head office in the United States would be looked upon with favor. *The untoward difficulties and potential conflict between the laws of different nations that such a doctrine would produce militate against giving it support here.*" 321 F. 2d at p. 24. (Emphasis added.)

The whole structure of the rules of conflicts of law or, as it is sometimes described, private international law, is designed to avoid the kind of situation for which the Government is arguing here—a situation in which a sovereign asserts jurisdiction over property not within its territory for the purposes of controlling the disposition of such property and, because of this improper arrogation of power, the sovereign of the situs of the property is, to say the least, offended. This Court has recently recognized the fundamental basis of this structure in its reference in the *Sabbatino* case to the "deep seated" "concept of territorial sovereignty." *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398, 432 (1964). New York's rule concerning foreign

branch deposits recognizes that in the case of such deposits, jurisdiction and control must be left to the host country, the territorial sovereign of the branch, and New York courts consistently defer to that sovereign. The Court of Appeals also felt that courts should not involve themselves in the problem of extra-territorial collections of tax revenues through freezing or seizure of property outside of the United States, and that the District Court must defer "in this highly sensitive area of intergovernmental relations." (321 F. 2d 14, 24).

If the converse of the Government's argument here is contemplated, the contents of the Pandora's box which the Government seeks to open are, as the Court of Appeals suggested, immediately apparent. Certainly the United States Government would look with extreme disfavor upon the order of a foreign court, which was served on a foreign branch of an American bank and purported to "freeze" a deposit in the United States because of the depositor's alleged foreign tax liability to the foreign sovereign.

The assertion by the courts of one nation of extra-territorial jurisdiction, in an effort to affect title to or the disposition of property in another nation, is an extraordinarily delicate matter which must be approached with utmost care. It may be, as the Government asserts, that in a certain limited number of cases, a court can, and should, order a person over whom it has *in personam* jurisdiction to take certain actions with respect to property outside of the national territory. However, this power ought not be exercised when the situation involves a party who is not an American citizen, when the proceedings are to enforce alleged tax liability or when the only person before the court is an innocent third party—for example, a bank whose

foreign branches have solemn obligations under the laws of their host sovereigns. To hold otherwise would give rise to pernicious and dangerous results which could only upset delicate balances of comity recognized among sovereign nations.

This court saw excellent reasons in the *Sabbatino* case for judicial self-restraint. It is submitted that the reasons against the extension of power sought by the Government in this case are even stronger.

C. Subjection of an Innocent Party to Substantial Liability.

Foreign branches of American banks are subject to, and must comply with, the laws of the foreign lands in which they do business. Under the laws of these foreign jurisdictions a branch depositor would continue to have a cause of action against the foreign branch for payment of his deposit even though the home office of the bank had purported to freeze or transfer the deposit pursuant to the order of a United States District Court. Such fact is no doubt one of the strongest bases for New York's rule against assertion of jurisdiction over such deposits. As noted above (Pt. IIB.) the New York rule wisely recognizes that foreign branch deposits, particularly those of residents of the host country, are viewed by the host sovereignties as local property, subject only to local law and jurisdiction. An order of a United States court purportedly affecting disposition of such a deposit would not protect the foreign branch from liability in the host country to its customer.

No claim is made in this case that respondent itself is liable for the Government's claims against Omar. So far as the controversy between the Government and Omar is concerned, respondent is an innocent bystander. In effect,

if the Government's position is sustained, respondent, although wholly innocent and in no way a party to any controversy between the Government and its customer, will be compelled to pay, from its own resources, at least a part of the tax allegedly due—i.e., to the extent of the amount of the deposit. For such would be the result if the bank were compelled to comply with a transfer order of a United States court, and, subsequently, were called upon to pay its depositor under a judgment of a foreign court. Therefore, to adopt the Government's position would not only tend to destroy the competitive position of foreign branches of American banks, but would also thrust upon American banks with foreign branches potential losses in very substantial amounts.

Nor would these losses be theoretical or speculative. Surely, Omar can be expected to claim any deposit with respondent's branch in Uruguay and, surely, the Uruguayan court can be expected to enforce such claim against respondent's branch (see Appendix to Respondent's brief). Conceivably, if such branch is compelled by an Uruguayan court to repay Omar, it might have a constitutional right to recoup from the United States Government to the extent of its double payment. See *Cities Service Co. v. McGrath*, 342 U. S. 330, 335 (1952). But even if there is such a theoretical constitutional right, in order to claim it, the branch would have to refuse Omar's payment order, deny liability for the deposit in the suit brought against it by Omar, with consequent damage to its standing in the local community, and after losing the Uruguayan suit bring an action against the United States Government. The entire maneuver would be nothing more than an exercise in futility by the tax collector at the expense of respondent's reputation and corporate funds.

Since foreign branches of American banks play an important part in our national economic policy, the entire procedure would only serve to tarnish and blunt these vital instruments of foreign commerce.

Conclusion

As the decision of the Court of Appeals is supported by unassailable authority, is entirely consistent with American foreign economic policies and reflects proper concern for the rights of innocent parties, it should be affirmed.

September 25, 1964

Respectfully submitted,

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OCT 26 1964

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

UNITED STATES OF AMERICA,

Petitioner,

v.

FIRST NATIONAL CITY BANK,

Respondent,

and

OMAR, S.A., a Uruguayan corporation; LAZARD FRERES
& CO.; LEHMAN BROTHERS; BELGIAN-AMERICAN
BANKING CORP.; BELGIAN-AMERICAN BANK AND
TRUST CO.; and FIRST NATIONAL CITY TRUST CO.,

Defendants.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT.

**MOTION FOR LEAVE TO FILE MEMORANDUM OF
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1964

No. 59

UNITED STATES OF AMERICA,

Petitioner,

v.

FIRST NATIONAL CITY BANK,

Respondent,

and

OMAR, S.A., a Uruguayan corporation; LAZARD FRERES &
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CORP.; BELGIAN-AMERICAN BANK AND TRUST CO.; and
FIRST NATIONAL CITY TRUST CO.,

Defendants.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT.*

**MOTION FOR LEAVE TO FILE MEMORANDUM
OF ATTORNEYS FOR OMAR, S.A.**

The undersigned, who are the attorneys for Omar, S.A., in its proceeding in the Tax Court, Docket No. 2041-63, respectfully move the Court for leave to file the Memorandum, forty printed copies of which are submitted herewith.

Copies of this Motion and of the Memorandum are being served on counsel for Petitioner and Respondent.

Respectfully submitted,

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October 23, 1964

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 59

UNITED STATES OF AMERICA, PETITIONER

v.

FIRST NATIONAL CITY BANK

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

REPLY BRIEF FOR THE UNITED STATES

The government's principal arguments are set forth in full in our opening brief. This reply brief will be devoted to answering several points raised by respondents and to rebutting arguments which misconstrue our position.

1. With respect to our first contention (Pet. Br. 10-23), respondent suggests that personal jurisdiction over Omar could be obtained only under a New York statute which became effective almost a year after the present suit was instituted (Resp. Br. 24-25).¹ In addition to the alternatives mentioned in

¹ Any contention that this State "long-arm" statute does not apply to federal proceedings is frivolous. See Rule 4 (d) (7), (e), (f), and (i), Federal Rules of Civil Procedure, and the

our main brief, however, as we observed on petitioning for rehearing in the court of appeals (R. 56), jurisdiction could have been obtained over Omar under prior New York law by service of process on Omar's representatives who performed acts on behalf of Omar within the jurisdiction. New York Civil Practice Act, § 229; see also New York Business Corporation Law, § 307. Moreover, Omar may also be served by reason of its institution of suit in the Tax Court on the identical claims underlying the present collection action. See *Walker v. Calada Materials Co.*, 309 F. 2d 74 (C.A. 10); cf. *Lamb v. Schmitt*, 285 U.S. 222.

2. Respondent's main challenge to our second contention (Pet. Br. 23-32) is that it constitutes an attempt to "alter and enlarge the obligation which respondent has undertaken to its customers" (Resp. Br. 19). This argument misconceives the government's position. In this case we seek only to enforce one of the many obligations attached by law to debts of any United States corporation, including a banking corporation. Whenever such a corporation contracts to pay a debt only to a specified creditor upon demand in a specified manner or at a specified place, the corporation must pay that debt, notwithstanding the absence of such a demand, if a lienor, garnishor

Notes thereto by the Advisory Committee on Rules, 28 U.S.C. App., Supp. V, 1588-1591. Section 302(a), New York Civil Practice Law and Rules, has been held constitutional. See *United States v. Montreal Trust Co.* (S.D.N.Y.), decided May 1, 1964. (13 A.F.T.R. 2d 1667, ¶ 64-70) (a subsequent opinion applying § 302(a) to particular facts was filed October 20, 1964. A petition for leave to appeal from the latter ruling was filed October 30, 1964.)

or judgment creditor of the original creditor institutes and prevails in a judicial proceeding to collect the debt. In such a proceeding the defense that the original creditor failed to make the agreed-upon demand is not available to the debtor corporation. Nor may it say that payment is being demanded at a different place than that named in the promise. Thus, when a debt is contracted with a United States corporation and one of the debt's conditions is that demand is to be made at one of its branches, domestic or foreign, the right of the creditor to enforce that debt turns on a fulfillment of the condition. But the lienor of such a creditor, in proceeding under the applicable law to foreclose his lien against the property held by the corporate debtor, may enforce his debt against the single corporate entity wherever he finds it without satisfying the condition. And in so enforcing the debt, the lienor merely asserts the same rights which the original creditor might have asserted had he become entitled to enforce the debt.

If enforcement of the debt by the government in New York instead of by the taxpayer abroad would result in a demonstrable burden on respondent's New York operations (Resp. Br. 9, 13-15, 21), the court can presumably allow respondent to make payment to agents of the United States in Montevideo or elsewhere.²

² Respondent can hardly contend that its main office and its branches are separate entities for purposes of any transfer from Montevideo to New York. Appendix A to its Brief in Opposition to the Petition for Certiorari attempted to indicate that while the injunction was in force respondent had agreed to make certain credits which were payable to Omar in Monte-

3. In an attempt to meet its burden of proof regarding foreign law, respondent has attached to its brief certain documents which were not presented to the district court and which do not appear in the record (Resp. Br. 1a-14a). Apart from the fact that they are *dehors* the record, these documents lack either the specificity or authentication necessary for a proper assessment of the conclusions which they allegedly support. Moreover, if they are to be taken at face value, the opinions expressed in the letters appear to state affirmatively that in certain jurisdictions—including Uruguay—respondent could protect itself against liability if it registered the injunction in the foreign jurisdiction.

We suggest that there is no reason to believe that Uruguayan courts would refuse to recognize a transfer of property effected by a United States court under laws and procedures not shown to have violated the international minimum standards. Certainly if "we consider the converse case" it is clear * * *

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video payable in New York instead. If the branches were, in fact, separate entities, such a transfer would have violated the injunction's prohibition against "transferring" credits held for Omar's account. Hence it appears that respondent considered the transaction merely as an internal accounting entry within a single "entity."

We note also that this Appendix indicates that 90% of the account described as payable in Montevideo was in dollar deposits. Compare Resp. Br. 9, 13-15, 21; opinion below, R. 41-42, 45, 49.

* The converse case is not, as the *amici* suggest (Br. 13), a foreign lien upon the foreign branch of a United States bank, but rather a foreign lien upon the main office of a foreign bank with a United States branch.

that we should take that view of a similar transaction occurring abroad." *Martin v. Nadel*, [1906] 2 K.B. 26, 29 (C.A.).⁴

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, is fully consistent with this conclusion. That case does not alter the general proposition that United States courts will defer to a foreign sovereign's acts with respect to property within or without the foreign state when the international criteria for fair procedure and substance are fulfilled. It merely establishes the further principle that when a transfer of property located solely within the foreign jurisdiction has been effected under the laws of that jurisdiction, our courts will not even inquire whether minimal standards of due process have been met. Surely *Sabbatino* does not stand for the proposition that a court of the United States called upon to act under local law must stay its hand merely because some foreign court may later be able to obtain jurisdiction. See *Railroad Co. v. Collector*, 100 U.S. 595, 598-599; *United States v. Imperial Chemical Industries*, 105 F. Supp. 215, 228-231 (S.D.N.Y.). Cf. *First National City Bank of N.Y. v. Internal Revenue Service*, 271 F. 2d 616, 620 (C.A. 2d); *Johansson v. United States* (C.A. 5th), decided September 2, 1964, (64-2 USTC ¶9743, pp. 93,907, 93,911-93,912); *United States v. Ross*, 302 F. 2d 831 (C.A. 2d).

4. Respondent and the *amici* assert that American branch banking would be substantially harmed if either of the government's positions were sustained

⁴ See Pet. Br. 34, n. 17.

by this Court. It does not appear, however, that any untoward consequences have resulted during the two years since the district court's order. The fact that some potential foreign customers might be "repelled by the extraordinary complexities of our tax system" (Br. *amicus*, 10) does not place respondent or any bank above the legal principles applicable to any other debtor in analogous circumstances. For if the banking industry requires extraordinary protection, it may be obtained by way of Congressional legislation. See *Glass City Bank v. United States*, 326 U.S. 265, 268.⁵ In the absence of special legislation, it is the responsibility of the Treasury Department to accommodate the United States' tax policies, enforced by the Internal Revenue Service, with its banking policies, which are in the domain of the Comptroller of the Currency and other executive agencies. The Treasury has struck this balance by stating its intention not to reach accounts payable at foreign branches unless the bank is specifically notified at the time of the levy and only if the accounts belong to depositors who are within the jurisdiction of a United States court or consist of funds transferred from the United States to defeat tax collection. See Pet. Br. 41-43. This case falls squarely within those bounds, and it is the only case presently before this Court.

⁵ Compare the exception established by the New York legislature in New York Civil Practice Act, § 916(3), cited by the court below (R. 44-45, n. 9). It appears that the statutes superseding the Civil Practice Act do not contain this legislative extension of the "separate entity" doctrine to attaching creditors. See New York Civil Practice Law and Rules, §§ 6202, 5201(a).

CONCLUSION

For the foregoing reasons and those stated in our opening brief, we respectfully submit that the judgment of the court of appeals should be reversed.

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